

Parliament and Scottish 'issues of conscience' in the 1970s:

Three case studies - Licensing, Divorce and Homosexuality.

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DECLARATION

I declare this thesis to have been composed by myself
and to contain all my own work.

James K. Carnie.

ABSTRACT

The aim of the thesis is to examine the politics of Scottish law reform and to explore what constitutes the 'Scottish dimension' in certain areas of legislation which involve morality and conscience. Specific attention is focused upon three Scottish 'issues of conscience' of the 1970s - the Licensing (Scotland) Act 1976, the Divorce (Scotland) Act 1976 and the 'non-reform' in Scotland of the law pertaining to homosexual conduct. Each of these issues requires separate Scottish legislation and hence offer an interesting insight into the variations that can exist in policy and the policy process for Scotland as compared with England and Wales.

Chapters 1 to 4 review some conceptual ideas through which the case studies are to be examined. Chapter 1 considers the idea of a 'Scottish political system' and discusses Scotland's unusual historical and political development. Cultural variations which have arisen are then highlighted. Chapter 2 examines some relevant approaches to policy analysis. It considers the debate between 'rationalist' and 'incrementalist' analyses of policy development, group theory and demand regulation, agenda control and non-decision-making, and values in policy formulation. In Chapter 3 there is a discussion of the philosophical debate on the legal enforcement of morals, a review of some empirical cases of moral issues, and an examination of Parliament's influence in various areas of policy. Chapter 4 explains the research methodology utilised.

Chapters 5 to 10 consider the case studies. Chapter 5 investigates the role of the Departmental Committee on Scottish Licensing Law in policy development. It looks at the social context of drink control in Scotland and the Committee's approach to the problem of alcohol

misuse. Policy development from the publication of the Report to the 1976 Act is traced in Chapter 6. Chapter 7 concerns itself with divorce and compares developments in England and Scotland in the 1950s and 1960s. The Scottish divorce reform attempts of the 1970s are discussed in Chapter 8 and some reasons as to why reform took longer in Scotland are postulated. Chapter 9 deals with the case of homosexual conduct. It is suggested that in Scotland throughout the 1970s the homosexuality issue constituted an example of a 'non-decision'. Chapter 10 brings the thesis full circle by relating in detail the conclusions of the case studies to points raised in the opening three chapters.

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INTRODUCTION

The aim of the thesis is to examine the politics of Scottish law reform and to explore what constitutes the 'Scottish dimension' in certain areas of legislation which involve morality and conscience. Specific attention is focused upon three Scottish 'issues of conscience' of the 1970s - the Licensing (Scotland) Act 1976, the Divorce (Scotland) Act 1976 and the 'non-reform' in Scotland of the law pertaining to homosexual conduct in private between consenting adults. Each of these issues, because of distinctive legal and cultural traditions, requires separate Scottish legislation. Hence, they offer an interesting insight into the variations that can exist in policy and the policy process for Scotland as compared with England and Wales.

Chapter 1 of the thesis explores the idea of a 'Scottish political system'. This idea, conceived by James Kellas, is based on Scotland's historical independence as a nation-state and on the preservation of a number of distinctive Scottish institutions after the Treaty of Union with England in 1707. Although the Scottish Parliament was abolished in 1707 the Church of Scotland, the Scottish legal system and the Scottish education system remained intact. Later in the 19th century the Scottish Office was established which had administrative autonomy in certain areas of Scottish affairs. This unusual constitutional arrangement has led Kellas to argue that a 'political system' still exists in Scotland.

According to Tom Nairn this political assimilation of the Scottish state in conjunction with the preservation of Scottish 'civil society' created a distorted 'cultural sub-nationalism'. The chapter continues by looking at some of the ways this 'cultural sub-nationalism' manifests itself in modern Scottish society, for instance, in the Church, the military, literature, sport and popular traditions. The apparent

paradox that emerges in the Scottish identity is the awareness that Scotland is not England combined with the opposing realisation that Scotland and England are closely linked within a British entity.

It is suggested that some kind of 'Scottish political system' did persist post 1707, but that this Scottish system is both dependent and independent within the larger British system. The problem lies in defining the boundary of each system. The case studies on Scottish 'issues of conscience' - licensing, divorce and homosexuality - illustrate this particular difficulty. Being issues which require separate legislation they highlight the way in which the 'Scottish political system' can operate in an independent capacity. However, they also demonstrate that even when apparently operating in an 'independent' capacity the Scottish system can still remain dependent on the British system at key moments in the policy process. To illuminate this point the thesis sets out to disaggregate and explore aspects of the Scottish political system by identifying actors and organisations and studying their interactions.

In Chapter 2 some approaches to policy analysis which appear relevant to the case studies are considered. The approaches are offered as a means to explore the component parts of the 'Scottish political system'. The chapter opens with a review of the debate between 'rationalist' and 'incrementalist' approaches to policy analysis. It is suggested that there is a confusion within this debate between 'ideal' and 'real' states of affairs. A distinction needs to be drawn between the normative value of rationalism and the explanatory value of incrementalism.

The theme which the chapter seeks to develop is that there is no one best way of explaining how policies evolve. Consequently, a combination of approaches is expounded to assist in identifying the

balance of forces which prevail in the different phases and different types of policies which are under consideration. It is suggested that a systems approach can provide a starting point from which to explore further various perspectives on policy analysis.

A section follows on group theory and demand regulation. Here it is noted how the 'package' of interests associated with a particular policy option can affect whether that option is adopted or rejected. This leads on to agenda management and 'non-decision making' which looks at how the political agenda is set and asks not only why some issues emerge, but also why others do not. The scope of the enquiry is thus widened to allow the more covert aspects of politics to be examined and this opens up the question of values in policy formulation. The chapter is brought to a close with an overview of how some of these approaches to policy analysis relate to the Scottish context.

The aim of Chapter 3 is to explore some of the philosophical and practical considerations in legislating on moral questions. It examines what types of activity and behaviour are appropriate for legal restriction. The main problem lies in making a sufficiently clear distinction between self-regarding and other regarding action and here a section is devoted to the philosophical debate between Lord Devlin and Professor H. L. A. Hart.

The chapter goes on to review some existing case studies on issues of morality and the law. These are considered in terms of the philosophical debate and are also related to the preceding chapters on approaches to policy analysis and Scottish culture. The cases of abortion, pornography, capital punishment and smoking are discussed in some detail. Comparisons between these and our cases on Scottish 'issues of conscience' are made intermittently.

The remainder of Chapter 3 examines some different conceptions of Parliament's role in policy making. Two main points of view emerge, one advanced by Douglas Ashford and the other by Philip Norton. The 'Ashford thesis' is the predominant one emphasising the primacy of the Executive and its bureaucracy. It argues that the increased complexity of the structure of government has led to the decline in the importance of direct democratic control through Parliament. The 'Norton thesis', on the other hand, questions the relevance of this viewpoint to the analysis of policy formulation in the 1970s and 1980s. Instead Norton points to a pattern of parliamentary behaviour in the 1970s which suggests that MPs have been more willing to dissent than has previously been the case. Parliament, it is argued, does have a role in policy-making, but it is up to MPs to put into effect the powers of scrutiny and influence already available. The thesis considers later what the case studies might reveal about these two differing analyses.

The methodology which was utilised in researching the thesis is explained in Chapter 4. Some of the arguments for and against a case study approach are aired in the opening section and the view adopted that the method is as effective as other approaches in suggesting general propositions about how policy develops provided certain basic safeguards are adhered to. An explanation of how the cases came to be selected is then given. A short section on sources of information follows before the final section describes in detail how the interviews were selected and undertaken.

Chapter 5 of the thesis deals with the first case study on the 1976 Scottish licensing reform. This chapter concentrates on the role of the Departmental Committee on Scottish Licensing Law (the Clayson Committee) in policy development.

Historical differences in the evolution of the licensing systems north and south of the border are mapped out before Scottish social attitudes towards drink are discussed. Ambivalent perceptions of drink prevail within Scottish popular tradition. On the one hand it is seen as a sign of sociability, but on the other it is viewed as a dangerous and addictive drug. One of the problems created by this ambivalent culture is the higher proportion of alcohol related problems in Scotland than in England and Wales. This was the problem to which the Clayson Committee had to address itself.

The chapter proceeds with a detailed breakdown of all aspects of the Committee's operation - its appointment, its approach to the problem, its assessment of the evidence presented, its mode of decision making and the effectiveness of its participatory processes. The ideas which are outlined in Chapter 2 on approaches to policy analysis are drawn upon when these issues are discussed, the aim being to identify the balance of forces which prevail in the different phases of policy formulation. Of particular relevance are the concepts of group theory and demand regulation.

The licensing study is continued in Chapter 6 where the transition from the Report's policy recommendations to a concrete legislative enactment is outlined. Here initial reactions to the recommendations are considered and the Report's impact assessed. The bulk of the chapter though, is taken up with an account of the Licensing Bill in Parliament. Attention is focused on how some of the more important decisions were arrived at and on the way in which pressure group activity and the values of MPs influenced those decisions.

The case study on divorce reform appears in Chapters 7 and 8 where comparative developments on either side of the border over the last few decades are investigated. The aim of the investigation is

to ascertain how and why the emergence of divorce policy differed in Scotland and in England. This case study too, draws upon a number of the concepts outlined in the earlier chapters.

Chapter 7 concerns itself with changing attitudes to divorce in the 1950s and 1960s. The Report of the Royal Commission on Marriage and Divorce (the Morton Commission) is reviewed and its inconclusive recommendations criticised. The more decisive 'Putting Asunder' by the Archbishop's Group and 'The Field of Choice' by the Law Commission are then commented upon. These last two papers formed the basis upon which English law was subsequently revised. The 'politics' of English divorce reform in the late 60s is discussed and the importance of parliamentary time highlighted.

Scottish developments are examined and compared with the English experience. It appears that for the most part Scotland followed in the wake of the English debate. However, in the late 60s the Church of Scotland shifted its ground dramatically and came out with the radical proposal that separation for a continuous period of two years should act as the sole ground for marriage breakdown. The Church appealed to the Scottish Office for legislative action but no response was forthcoming. Thus, the Scottish divorce issue moved into the 70s.

Chapter 8 examines the events in Scotland which led to the 1976 Divorce (Scotland) Act. It begins by outlining the different reform attempts of the first half of the decade and notes the lack of available parliamentary time despite consistent appeals from MPs and others. Public opinion on the issue is then assessed in terms of pressure group interest, MPs' appraisal and the media before the 'politics' of the 1976 reform is discussed. Some of the obstacles which presented themselves in the path of Scottish reform are analysed and some reasons for the apparent swing in opinion are offered.

Like the other two studies the case of homosexual law reform is concerned with comparative developments north and south of the border. Once more in Chapter 9 the aim of the enquiry is to establish how and why policy developments in Scotland and in England varied as they did. And again this study will refer to several of the conceptual ideas expounded at the beginning of the thesis.

After referring to the 19th century origins of the law the chapter outlines some of the shifts in thinking on homosexual conduct during the 1950s and 1960s. Pressure from, amongst others, the Howard League for Penal Reform helped to have the Committee on Homosexual Offences and Prostitution appointed. Its Report (the Wolfenden Report), published in the mid-1950s, set the tone for liberal thinking on the homosexuality issue. It recommended the decriminalisation of homosexual relations between consenting adults in private and it was this recommendation which was to spark off the philosophical debate between Devlin and Hart. Politically though, it was a sensitive issue which not many MPs were prepared to take up. It also took time for public opinion to coalesce so it was not until 1967 that a reform was achieved. The campaigning zeal of Leo Abse features prominently here.

Developments in Scotland are then compared. These include the change in the attitude of the Church of Scotland in the late 60s from its earlier pronouncements in the 50s, the Lord Advocate's policy of 'no prosecutions' against homosexual adults consenting in private, the rise of the Scottish Minorities Group and its campaign for legislative reform in the early 70s, the unusual anomalies raised by the 1976 Sexual Offences Consolidation Bill and the unsuccessful reform attempts in Parliament in the late 70s. The chapter goes on to examine the 'politics' of the 1980 Scottish reform initiated by Robin Cook and raises the question whether this is the way to reform important Scottish

legislation. It is suggested that in Scotland throughout the 1970s the homosexuality issue constituted an example of a 'non-decision'.

The thesis is drawn to a close with the conclusion in Chapter 10. This brings the thesis full circle by relating in detail the conclusions of the case studies to the theoretical points raised in the opening three chapters. There are three sections to the conclusion one corresponding to each of the first three chapters. Sequentially, each chapter is discussed in reverse order so that the thesis may end with a statement on the 'Scottish dimension'. Thus, the implications of the case studies for law, morality and policy-making in Parliament are discussed immediately after the chapter's brief introduction. The next section considers how the findings of the studies relate to the approaches to policy analysis outlined in Chapter 2, and the final section examines what the cases reveal about Scottish politics and culture generally. The thesis ends with the observation that there is a great deal of truth in Naim's description of Scotland as an 'unclassifiable marginal aberration'.

CHAPTER 1

The Scottish Political System

'.....the case of Scotland cannot be fitted neatly into any of the existing categories of political science.'¹

'.....an unclassifiable marginal aberration: an ex-nation turned province, neither one thing nor another.'²

The position of Scotland as a political entity within the British political system was increasingly brought into question throughout the 1970s as a result of the debate engendered by the steady rise of nationalist sentiment and consciousness during the course of the decade. The traditional conception of Britain as a unitary, multi-nation state, characterised by political homogeneity and the sovereignty of parliament came to be challenged by accounts which sought to explain the modern tendency towards political disintegration in terms of the particular historical development of the British state. Accounts of Scotland's peculiar political status placed emphasis on its historical constitutional position and on its distinctive political and social institutions. Thus, it was on this basis that Kellas employed his notion of the 'Scottish political system'.

The central thesis of Kellas is that Scotland enjoys a strong sense of national identity or 'nationhood' which derives partly from the long history of Scotland's existence as an independent nation-state before the union with England and partly from the fact that many Scottish institutions have remained intact and distinctive since the union. A distinction should be noted here between national self-consciousness and nationalism in a political sense. While virtually all Scotsmen are conscious of being Scottish not all of them are inclined towards Nationalism as a political cause.

Although the Scottish Parliament was abolished with the Treaty

of Union in 1707, Scotland did retain a number of its key institutions. The Scottish legal system was preserved. This was important because it preserved differences in law between the two countries and maintained Edinburgh as the centre of Scottish legal practice. The Presbyterian Church of Scotland remained the established church and the English made no attempt, as they did in Ireland and Wales, to impose the Church of England. The Scottish education system was also retained with its separate principles and syllabuses, as was the Scottish local government system.

The Scottish Office is another autonomous institution, but this was not created until the late 19th century. Following the Union in 1707, both the offices of the Secretary of State for Scotland and the Lord Advocate were to be found in existence, the former minister being entrusted with the government of Scotland, while the latter was the chief government law officer in Scotland. However, in 1746 the Scottish Secretaryship was abolished and the Lord Advocate assumed the responsibility for government business in Scotland.

During the 19th century the functions of government increased especially at the local level: specialised local bodies became responsible for poor law relief, public health and education and the main burghs became active in various forms of environmental improvement such as water supply, drainage and town planning. Some control was needed and there thus arose a number of supervisory boards like the Board of Supervision for Poor Relief (1845) and the Scottish Education Board (1872). The task of these Scottish administrative bodies was to supervise the various local government functions.

In addition to the growth of government responsibility, the latter half of the 19th century saw the steady rise of nationalist sentiment in Scotland. These two factors eventually led to the

creation of the Scottish Office in 1885 which was to be responsible for a number of functions that were previously the responsibility of the Home Office. The Scottish Secretary was to be responsible to Parliament for Scottish affairs, although the office did not carry Cabinet status until 1892. Further, it was not until 1926 that the Secretary for Scotland was elevated to the rank of a Principal Secretary of State.

During the course of the 20th century the Scottish Office grew steadily in size and in its range of functions until today in modern Scotland it is the equivalent of several Whitehall departments. Since the opening of St. Andrew's House in Edinburgh in 1939 there has been a continual but piecemeal transfer of functions to and from the Office involving a number of departmental reorganisations. The Scottish Office currently has five departments consisting of Agriculture and Fisheries, Development, Home and Health, Education and Economic Planning.

As well as the Secretary of State for Scotland, the ministerial team at the Scottish Office usually consists of a Minister of State, and three Under-Secretaries of State, although in the past other formations have been adopted. The three junior ministers are given 'subject briefs' while the Minister of State is generally responsible for conducting Scottish business in the House of Lords. The Secretary of State thus sits at the top of a complex administrative network responsible for the running of Scottish affairs. In this he has a considerable amount of autonomy, but he is also a member of the Cabinet and is therefore subject to collective responsibility. Consequently his role is double edged in that he can speak for Scotland in London but he can also speak for London in Scotland.

Another innovation of the late 19th century was the setting up of the Scottish Grand Committee in 1894. As parliamentary time became increasingly valuable and the process of passing laws for Scotland increasingly troublesome, the Committee, of which all Scottish MPs were members, was seen as a means of relieving some of the pressures on the House. The Committee offered the time and means for Scottish Members to debate issues and legislation which pertained solely to Scotland. Apart from the General Assembly of the Church of Scotland and in spite of its limited functions, G. E. Edwards has suggested that the Scottish Grand Committee 'is the only institution which even vaguely resembles a Scottish Parliament'.³

These institutions, then, have helped to preserve some of the distinctions between Scottish and English society and to maintain a clear sense of national self-consciousness in Scotland. According to Kellas they became 'the transmitters of Scottish national identity from one generation to the next'.⁴ Likewise, Drucker and Brown note that 'Scotland possessed officially recognised institutions through which its nationalism could be expressed'. This gave Edinburgh 'the status of a capital and administrative centre and allowed for the development of a Scottish culture'.⁵

That Scotland has its own institutions is a widely accepted proposition. A question arises, however, about how these institutions may be understood to relate to the British political system. For Kellas the answer lies in designating Scotland a 'political system'. While he concedes that Scotland could be called a 'sub-system' of the British system, he argues that such a description would be ambiguous since any territorial local authority could be called a sub-system of the central authority. As Scotland cannot be conceptualised as a local authority, it would have to be considered some kind of 'super-sub-

system'. His contention, however, is that the 'concept of system is more appropriate, since it does justice to the scale and nature of the phenomena which are found in Scottish politics'.⁶ This contention will be examined more fully presently. But before doing so let us look at some broader aspects of Scottish political culture in a historical context.

Perhaps one of the most sophisticated accounts of the development of Scottish political culture comes from Tom Naim. The ingenuity of Naim's analysis lies in his adoption of a Gramscian framework which attempts to operationalise the concept of 'civil society' in a Scottish historical setting. His argument is that to understand any society one must distinguish between its 'State' or political and administrative structure, and its 'civil society', such as its most characteristic non-political organisations, its religious and other beliefs, its customs and way of life. Ray Burnett has expressed this idea in the following way:

'To begin with, while we have a homogeneous British State it must be noted that the organizations and institutions in civil society which comprise its bulwarks and defences have an azoic complexity the most significant feature of which for us is that civil society in Scotland is fundamentally different from that in England. What is more, much of our shared 'British' ideology as it manifests itself in Scotland, draws its vigour and strength from a specifically Scottish heritage of myths, prejudices and illusions.'⁷

Naim contends that the pattern of Scotland's historical development has been unique. Its peculiarity stems from three inter-related phenomena - from the lateness of Scotland's absorption into a larger state, that is at the beginning of the 18th century, rather than in the later Middle Ages; from the manner of the fusion itself, that is a Treaty of Union between two ruling classes; and from the subsequent results of the agreed bargain, that is 'a nationality which resigned

statehood but preserved an extraordinary amount of the institutional and psychological baggage normally associated with independence - a decapitated national state, as it were, rather than an ordinary "assimilated" nation.¹⁸

Scotland's eccentricity lay in the fact that, apart from the State itself, 'civil society' was guaranteed its independent existence by the Union. So all the institutions aforementioned - the church, law, education, royal burghs - and the dominant social classes linked to them were safeguarded, as was the dominant social culture they represented. Thus, in contrast to the usual models of nationalist development (of *one* political State and *its* society, or *one* distinguishable ethnic society and *its* own State) the Scottish pattern was of a distinct civil society not married to 'its' State.

With the passage of time Scotland's peculiarity was to become firmly entrenched. Between the later 18th century and the middle of the 19th, England was moving towards a socio-economic transformation which would carry it to industrial and political supremacy. Through the unusual circumstances of the Union and the development of Lowland Scotland in the late 18th century, the Scots were able to establish a singular subordinate position inside this expanding system of English capitalism. Statehood had been sacrificed for participation in the English and colonial markets of the day. Within this larger economic area that Scotland had entered, an autonomous sub-system had been created, one borne along by English imperial expansion.

Nairn has commented:

'Scottish civil society had advanced too far, too quickly. The new bourgeois social classes inherited a socio-economic position in history vastly more favourable than that of any other fringe or backward nationality. They were neither being ground down into industrial modernity, nor excluded from it. Hence they did not perceive it as alien, as a foreign threat or a withheld promise.

Consequently, they were not forced to turn to nationalism, to redress the situation. They reacted to the inexorable and revolutionary changes of the crucial period even more fiercely than their English partners - with a conservatism amplified, perhaps, by the uneasy sensation of how much more there was to repress and divert in Scotland.⁹

Under these conditions Scotland was 'stranded'. It was too much of a nation and had too different a civil society to become a *mere* province. Yet it could not develop its own nation-state on this basis either, via nationalism. Cultural repercussions arising from such an anomalous situation were inevitable. An anomalous historical situation could not engender a 'normal' national cultural evolution. Instead it produced a stunted caricature of it in the form of a 'cultural sub-nationalism'.

This 'cultural sub-nationalism' manifests itself in many ways in modern Scotland, not least in the array of Kitsch symbols, slogans and sentiments which have come to represent Scottish popular tradition. As Nairn puts it:

'the popular consciousness of separate identity, uncultivated by "national" experience or culture in the usual sense, has become curiously fixed or fossilised on the level of the image d'Epinal and Auld Lang Syne, of the Scott Monument, Andy Stewart and the "Sunday Post" - to the point of forming a huge, virtually self-contained universe of Kitsch'.¹⁰

The Kailyard school of literature is often cited as typifying Scotland's cultural sub-nationalism. It has been perceptively defined by Nairn as 'consisting wholly of small towns full of small town "characters" given to bucolic intrigue and wise sayings.'¹¹ This tradition still manifests itself in modern day television programmes like 'Dr. Finlay's Casebook' and in the publications of D. C. Thomson of Dundee. Yet it is not only literary influences that have contributed to Scotland's cultural sub-nationalism. The Church, the military

and sport have all had a reinforcing effect. The Church has been one institution if not *the* primary institution which has expressed the Scottishness of Scottish society. It has consistently been determined that Scottish life styles should be maintained and has pronounced at regular intervals through the General Assembly deliverances concerning the keeping of the Sabbath and the virtues of Calvinist theology. The General Assembly has served as a forum for the expression of Scottish opinion on social and political matters and indeed, on occasions it has even been considered as a surrogate Scottish 'parliament'. Thus, its weight within the complex of cultural sub-nationalism has been considerable.

Popular militarism is also part of that culture. One of the traditional images of the British army has been the Highland regiment with its kilts and bagpipes, and its reputation, based partly in myth and partly in fact, for outstanding courage. Quite apart from their exploits in the field these military units played a large part in Scottish life by contributing to the maintenance of national sentiment. Highlanders, having at one time been viewed as barbarous nuisances, became regarded in some ways as the very embodiment of the spirit of Scotland. In Nairn's view this militarism represented the spontaneous contribution of Scottish society to the State, and one which deeply affected the masses.

No discussion of Scottish culture would be complete without reference to sport, and to football in particular. Scotland's passion for football is obsessional. The waving of Lion Rampant banners, the singing of 'O Flower of Scotland' and the bellowing of national war-cries accompany the Scottish side in their international encounters, especially against the Auld Enemy England. "Why such super-patriotism in the realm of sport?", the standard enquiry runs.¹² Again the

answer is to be found in Scotland's historical and cultural evolution.

As Brand has noted:

'The ... point which makes football interesting is the way in which it exemplifies the attitudes of many Scottish people to England. The match between Scotland and England is very much a David and Goliath affair in that England has ten times the population resources from which to draw her team and this situation is recognised by the Scottish supporters. Secondly, there is a feeling that Scotland is in other ways inferior to England and must demonstrate her superiority.'¹³

The English themselves tend to provoke this response through, amongst other things, their use of the Union Jack as a symbol of *English* nationality. Geoffrey Barrow has pointed to the fact that 'the 1800 Union flag, carefully designed to symbolise the constitutional merging of the three realms of England, Ireland and Scotland, has been adopted in recent times as the peculiar national flag of England, thus converting an emblem of supposedly voluntary unity into an arrogant symbol of suppression and extinction.'¹⁴

James Campbell, commenting upon the way the game permeates Scottish life, has argued that in Scotland football is a substitute for politics:

'Scottish football teams, national and local, serve as emblems of national identity in ways that are not true of countries with a more secure sense of who they are and why they exist. Deprived of a political "team" which could compete in the international arena, we depend upon performances in other areas: art or science or sport. Never noted for serious attention to artistic endeavour, and with the great days of Scottish medicine and science behind us, it is no surprise that our national self-esteem is most often at stake on a football field.'¹⁵

Thus, in order to understand this issue of Scottish identity one must take into consideration certain aspects of Scottish history since the Union. The peculiar position of Scottish civil society, too developed and too distinct to be assimilated, yet no longer requiring to

form a State of its own, led to an interrelated series of developmental oddities. As Smout has noted:

'The history of the Union enshrines the continuing central paradox of the Scottish identity. It bears witness to the survival of an elemental nationalist consciousness that Scotland is not England; and on the other hand it carries the apparently opposing consciousness that Scotland and England are linked within a national British entity.'¹⁶

Scottish development has been a case of assimilation in politics but separation in social mores. For Kellas, as noted earlier, this Scottish national identity lay in, and could be observed in, Scotland's distinctive institutional structure. However, it has been suggested here that this 'identity' has not been entirely institutional in nature, involving as it does, wider questions of society and culture. As Nairn argues:

'The "identity" which it is vital for us to understand goes beyond these institutions, even in their mutual interaction; it concerns "civil society" as a whole, and the diverse ways in which this separate character was articulated through both intellectual culture and popular or mass culture. This made us what we are. It is not a matter of the semi-autonomy of certain institutions, nor of a straightforward contest between a Scottish "social ethic" and assimilationist influences pressuring it from without. It is a question, rather, of the profound, lacerating *contradictions* forced upon Scottish society by its anomalous mode of development.'¹⁷

Thus, Scottish society, by virtue of 'its anomalous mode of development' can be said to possess a distinctive political culture. Can it also be said to manifest a distinctive political system? Let us at this point return to examine Kellas' notion of the 'Scottish political system'. The use of the concept of system in social science has been the subject of intense debate¹⁸, the scope and detail of which is considerable. Consequently, only those aspects of the debate which are of immediate and direct relevance to our discussion will be referred to here.

Peter Nettl has identified the essential features of the general concept of system as follows:- a system is first of all a whole, not merely an aggregate; secondly it consists of objects or elements in interaction, not merely in random contact; and thirdly the system is open, that is the behaviour of the system depends on external as well as internal factors arising from a relationship with the environment. Problems can arise though from the variety of uses to which the concept is put. A distinction is therefore usually drawn between the use of the concept of system for bounded whole societies, that is all-embracing social systems, and the concept of system as a functional crystallization of processes and structures within a society, that is social sub-systems. Generally it is more common for sociologists to use the concept in the former sense, while political scientists make greater use of it in the latter sense. For the sake of clarity here this differentiation of type will be maintained by referring to the suprasystem as 'society', while confining the term 'system' to its political science usage to indicate that a political system is a sub-system of society.

The issue which is at the heart of the matter in the Scottish context, and which preoccupies systems analysts generally, is the question of system survival. Given Scotland's historical development has a Scottish political system survived?

It is important here to consider the distinction made by Easton between *system-maintenance* (maintenance of a *particular* kind of political system) and *system-persistence* (persistence of *some* kind of political system). Easton says that 'to persist it may be necessary for a system to have the capacity to transform its own internal structure and processes'¹⁹. But how far can a political system change its own structure before it becomes a totally different political system?

When can we say that a system has, in fact, failed to persist?

Easton responds, 'to say that a system has failed may mean one of two things: that it has changed but continues to exist in some form; or that it has disappeared entirely. As the first meaning indicates, a system can be said to persist even if it changes'.²⁰ Non-persistence then, points to a condition which involves the complete breakdown of the political system. Thus, 'historical political systems have disappeared ... when they have been absorbed into alien systems'.²¹

According to Easton, Scotland is of this type.

However, Michael Evans has pointed out that the examples provided by Easton to illustrate the disappearance of political systems, among them Scotland, do not demonstrate the failure of political systems to *persist*, but are examples of the failure to *maintain* a *particular* kind of political system.²² Thus it can be argued that while the particular pre-1707 Scottish political system failed to be *maintained* by the Treaty of Union, a political system of some kind did *persist* post-1707, given that the bulk of Scottish society remained intact as a result of the process of assimilation discussed earlier. This, of course, begs the question, what kind of political system?

Nettl has remarked that a political system 'is capable of identification from actions, roles and institutions appertaining to goal attainment'.²³ This is fine in as far as it goes, but what must also be remembered in the Scottish context is the dualism subsumed in goal attainment, that is in some instances goals will be predominantly Scottish, while in others they will be predominantly British. As Kellas has pointed out the Scottish 'political system' acts as a means of communication with the larger British system, as well as being a communications and decision-making network within Scotland itself in those areas of politics where British interests are not so involved.

The concept of a 'political system' as applied to Scotland must, therefore, take account of these two 'activity areas' - the Scottish and the British.

The boundaries of the system are different in each case. The Scottish system can act as a communications input to the larger British system in areas which are essentially 'British', such as taxation and economic policy, making known the demands and needs of the Scottish people (even although there may be a variety of interests and opinions within the system). On the other hand, within the sphere of Scotland itself the Scottish political system covers all the activities necessary for the functioning of the Scottish legal system and Scottish Office administration. These activities act solely on the population of Scotland. Thus the judicial process is contained entirely within the system and so in effect is the function of law reform (though it is formally dependent on the British system in that it must pass through Parliament). As Kellas states:

'What has to be discovered is the range of activity which is effectively Scottish, despite the formal necessity for legislation or executive decision at the British level. For example, the activities of the Scottish Office, the decision-making in Scottish law reform, Scottish education, housing, and local government are predominantly within the Scottish system'.²⁴

Thus the Scottish system can be seen as being both dependent and independent within the British system. Michael Keating has emphasised this point:

'The Scottish political system is both dependent and independent within the British system and can at one time be regarded as a sub-system of the Scottish social system and, therefore, a political system in its own right (as when legislation concerning Scots law or local government is being enacted) and at another time as a sub-system of the British political system (as when UK legislation is being modified to suit Scottish conditions, or demands are being made upon the UK system). No clear model then exists to

which the Scottish political system conforms and the system is indeed unique in trying to provide for the maximum degree of autonomy within a unitary state and Parliament'.²⁵

One problem, however, is that of defining the boundary since it is not always clear whether it is the British system which is determining Scottish (i.e. applying only to Scotland) values, or the Scottish. Nor is it clear how important Scottish (as opposed to British) values are in Scotland. Thus, on the one hand, Kellas maintains that the relationship between the Scottish legal and political systems is perhaps the strongest single reason for the autonomy of the latter. Separate laws engender separate politics and administration. Yet, on the other, he notes:

'Even in areas of administration less dependent on purely financial considerations such as law, education and the structure of local government, the need to conform with a pattern established by the corresponding ministries in England is strongly felt. Scotland cannot diverge too far from the norms of the rest of the country if the general desire for equality before the law, social justice and the mobility of labour is to be satisfied'.²⁶

This problem of defining boundaries is one of the major issues to which our case studies are addressed. Kellas, once again, neatly summarizes the dilemma:

'At one extreme there is the self-contained world of the Scottish lawyer, with his ability to control the technical aspects of Scottish law reform. At the other, there is the political discourse between MPs and the public on divorce, abortion and other "moral" issues. While each process belongs inside the Scottish political system, in the sense of being primarily a matter of communication among those in Scotland with only incidental reference to England, the boundaries break down to some extent through the awareness of English practices, the increasing assimilation of Scottish society to that of England, and the desire in Great Britain to establish "equal rights" for all citizens'.²⁷

Richard Parry is one of the few to have addressed this problem.²⁸ He has explored the idea of 'Scotland as a laboratory for public

administration' - that Scotland's special circumstances and place within the United Kingdom have enabled it to play an experimental and innovative role in the development of British policy and administration. He suggests that there has been -

'confusion about just how much autonomy is enjoyed by Scottish administration and about whether differences in practice are meaningful, have altered over time, extend over the range of public policy, and offer any lessons for England. The picture is one of considerably varying scope for discretion, related to a notion of acceptable and unacceptable areas which is not consistent or accurate, and of an observable set of Scottish practices whose distinctiveness and policy impact may be meaningful or trivial'.²⁹

Thus he is prompted to ask why Scottish administrative creativity is 'safe' in some areas but intolerable in others. To illuminate this three examples of Scottish administrative creativity are discussed in detail - the organisation of the Scottish Office over the years; the institutional reshaping of local government, social work and the health services; and the introduction of policy planning and regional reports to local government. Of these he identifies only the reorganisation of social work practice in the late sixties as being radically different from English policy. Thus, he is pushed towards the conclusion that the concept of Scotland as a laboratory for new policy practices is a limited one. He observes:

'At various times Scotland has acquired the scope for autonomous political action, but its divergence from United Kingdom norms is one of administrative distinctiveness rather than political substance'.³⁰

The case studies which follow on Scottish 'issues of conscience' - licensing, divorce and homosexuality - have been selected to illustrate these particular dilemmas. Being issues which require separate legislation pertaining only to Scotland they highlight the way in which the Scottish political system can operate in an independent

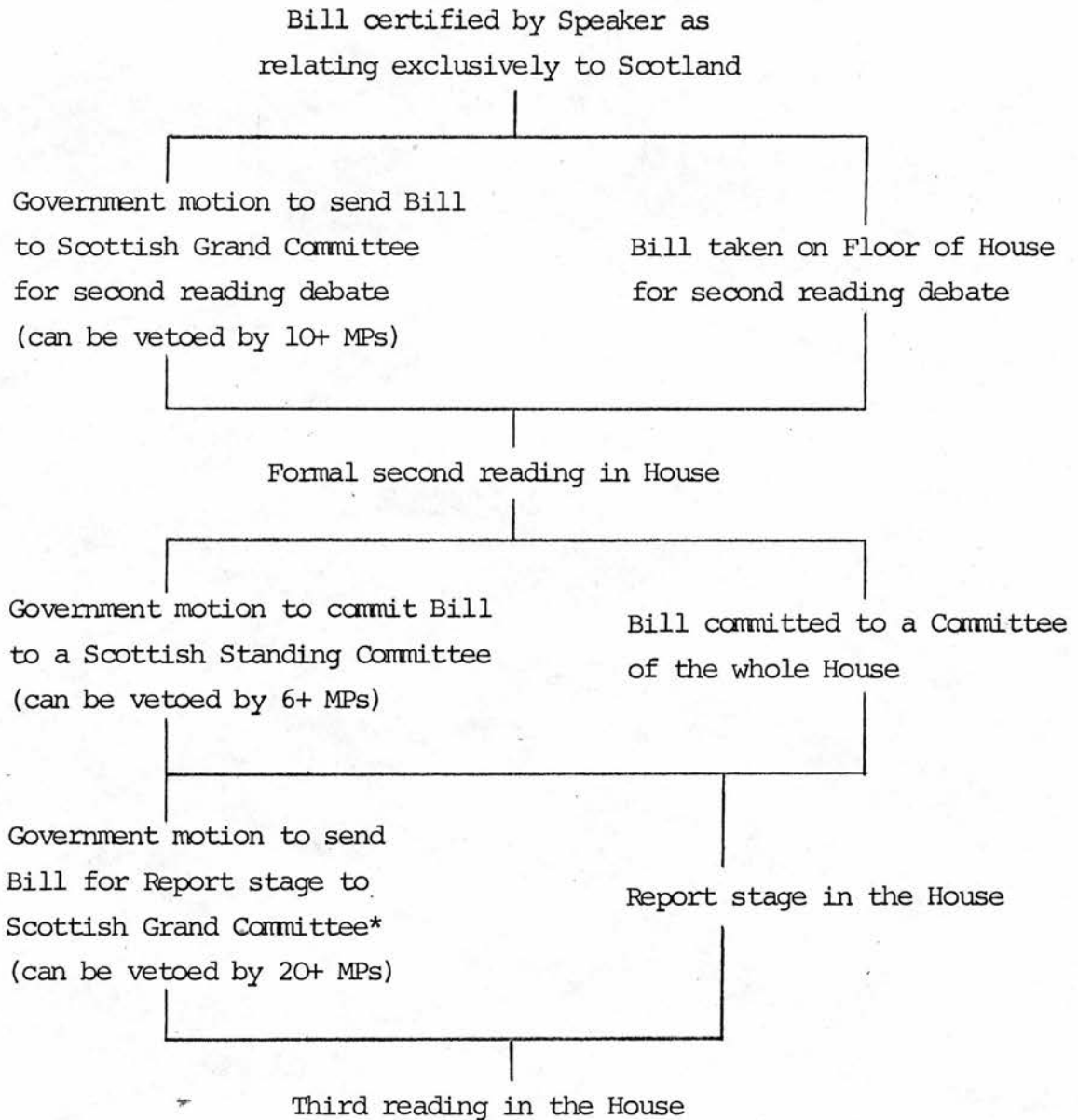
capacity. Yet they also serve to demonstrate that even when operating in this 'independent' capacity the Scottish political system is often dependent upon the larger British political system at critical moments in the policy process. Thus, in order to understand the development of policy in the areas in question it will be necessary to disaggregate and explore the Scottish political system, identify actors and organizations, and study their interactions.

Parliament itself highlights the interaction of the Scottish and British political systems. Scottish MPs form a distinct group in the House of Commons since interest in Scottish affairs is virtually non-existent amongst other MPs. Consequently a legislative procedure for Scottish Bills has emerged (see Table 1.1) involving the Scottish Grand Committee (for general and second reading debates) and the First and Second Scottish Standing Committees (for detailed scrutiny of legislation). In addition a Select Committee on Scottish Affairs which has investigatory powers to scrutinise any aspect of Scottish business through public examination of witnesses and documents, was reactivated in 1979 as part of the Conservative's overhaul of Parliament's Select Committee system. The Select Committee on Scottish Affairs had been established by Harold Wilson in the late sixties but had fallen into disuse.

While Scottish affairs interest mainly Scottish MPs, the boundary of the Scottish 'political system' in Parliament is not as clear cut as might first appear. The parliamentary system involves non-Scottish MPs in purely Scottish affairs whether they like it or not, since Scottish Bills are sometimes taken on the floor of the House, the Scottish Grand Committee until 1979 sometimes had unwilling English MPs co-opted on to it to preserve party balance, and Scottish question time is in the House as a whole. So there exists a rather untidy

TABLE 1.1

House of Commons Procedure for Scottish Bills



*This procedure is available only for Bills considered previously in the Scottish Grand Committee.

Source: Kellas, *The Scottish Political System*, 1975, p. 83.

overlap between the Scottish and British systems at Westminster which both Scottish and non-Scottish MPs at times find irritating.

Interaction between the two systems is also to be found in the realm of pressure group politics. Since Scottish policy can be formulated at two centres of power, Edinburgh and London, pressure groups have two points of 'access' through which to make their representations. In matters which are primarily the concern of the British political system, pressure will tend to be exerted directly on the relevant Whitehall department. In matters which fall wholly or largely within the sphere of the Scottish political system, pressure is more likely to focus on the Scottish Office. Thus in areas like education, the law and medicine, Scottish organisations can communicate directly with the Scottish Office. This has prompted Kellas to comment that 'outside the industrial arena, Scotland is remarkably self-contained in its range of organised groups, and by inference its own decision-making network'.³¹

The Scottish Office, then, is of particular significance in the Scottish political system. It will be seen in the next chapter that bureaucracy can control the entry of demands into the political system in such a way as to affect both the formulation and implementation of policy. The control may not be overt but can be circumstantial and situational in that administrative 'style' can influence policy output. This is especially true of the Scottish Office as Kellas observes:

'A great number of Scottish political decisions are taken under the shadow of, or actually inside, the Scottish Office in Edinburgh. The ministers and civil servants of St. Andrew's House run Scotland in as centralised and efficient a manner as Whitehall runs Britain. Clearly, a focus for the Scottish ruling elite is to be found in the corridors of St. Andrew's House and a constant stream of councillors, officials, pressure group deputations and

individual citizens converge there to seek a favourable decision for their cause. This is a variant of the "corporate state", because it operates without any democratically-elected Scottish body. The interest groups meet with the civil servants and ministers in St. Andrew's House and they decide between them what is to be done'.³²

Chris Allen has also drawn attention to the centralised and corporate nature of the Scottish system. He suggests that the Scottish system is marked by six main features - centralisation, administrative primacy, exclusiveness, secrecy, corporatism and authoritarianism. While these features can be found in the British system in general, Scotland, it is argued, is unique in the degree of their overall importance and in the pervasiveness of their influence. Here the importance of administrative action in Scottish government is emphasised:

'The exclusiveness of the system lies in the restriction of influence over decision-making to a small body of fairly senior Civil Servants and MPs, and a large but still modest group of persons regularly consulted or involved in the various boards, committees and commissions established by the Scottish departments and their appointed bodies. While the latter group include a small proportion who owe their selection to having been elected to these or other bodies, or who regard themselves as representing a general interest, the bulk of the membership consists of persons with a professional or sectional interest, accountable only to those who appointed them'.³³

Our case studies should enable us to see how far this claim can be substantiated.

Clearly the Secretary of State for Scotland, who heads this administrative structure, will be in a powerful position to exercise control over the types of issues which emerge onto the political agenda for consideration and public discussion. As we shall see in the following chapter, the values of those in power can be influential in the setting of priorities and thus have a bearing on the emergence or non-

emergence of issues. This is especially true in our case studies on Scottish 'issues of conscience' where a 'tangled skein of values' will have to be unravelled.

To understand the case studies it is important to appreciate the socio-political context in which they were set. It was noted in the opening paragraph of this chapter that the constitutional position of Scotland within the British political system was hotly debated in the 1970s. This was the product of a rising national consciousness and of a Scottish political climate in which the issue of devolution was very much to the fore. Consequently, debate on matters arising in our cases was often associated with the wider argument concerning devolution. As Robin Cook pointed out, 'it was ... inevitable that Parliament's handling of ... Scottish law reform should become part of the rhetoric in the disputes over whether this function should be devolved to a Scottish Assembly'.³⁴ The argument was made that desirable social reforms in Scotland were lagging behind reforms in England because of a congested legislative machine at Westminster. At this juncture, then, let us turn and examine the wider political context of the period.

Several features of British government can be identified as having helped to create the upsurge in nationalist sentiment in the latter part of the sixties. According to Gunn and Lindley the origins of the devolution movement of the seventies lay in such factors as increasing centralisation; the growth of ad-hoc government agencies; devaluation of the Scottish (and Welsh) way of life; British economic stagnation; and the economic 'hope' offered by autonomous development.³⁵ They suggest that the increasing centralisation of modern British government with its functional division of responsibilities had resulted in an overloaded central administration, bureaucratic remoteness,

concern with national uniformity of provision, and failure to co-ordinate or relate central government programmes to one another or to local conditions. In addition the tendency of post-war British governments to 'hive-off' activities on a functional basis to a plethora of ad-hoc boards, commissions and agencies (a disproportionate number of which were in Scotland) had given rise to problems of accountability. In this respect, the centralised and corporate nature of the Scottish Office made it particularly prone to criticisms concerning its accountability.

Centralisation had also led to feelings of 'anglicisation' amongst the Scots and Welsh. As noted earlier the Scottish sense of identity draws upon a history of separateness from England, and after the Union of 1707, upon distinctive Scottish traditions and institutions in education, religion, law and much else (including even football). Nationalist sentiment among both the Scots and the Welsh tends to feed upon real or imagined examples of English insensitivity to their respective cultural heritages.

Perceptions of economic disadvantages such as lower earnings, higher unemployment and declining traditional industries also played their part in fuelling nationalist sentiments. Whether the economic grievance corresponded to fact was not as important as the sense of resentment and the *belief* that Scotland was materially worse off. And, of course, on the other side of the coin lay the economic 'hope' of autonomous development offered by the discovery of North Sea oil in 'Scottish' waters.

The cumulative effect of these perceived grievances was to produce a surge of nationalist feeling in the late sixties and early seventies which resulted in unprecedented successes at local, general and by-elections for the Scottish National Party and, to a lesser

extent, Plaid Cymru in Wales.

The watershed in the electoral performance of the SNP is generally regarded as being 1967. Prior to this Scottish electors had voted, in much the same way as English electors, for one of the two main governing parties, either Labour or Conservative, with any third alternative being confined to the Liberals. That said though, in both Scotland and Wales, Labour had traditionally been the dominant force. Some indication of the SNP's limited electoral popularity can be gauged from the 1959 General Election when, fielding 5 candidates, they received a meagre 0.8% of the Scottish poll. Modest progress was discernible when they fielded 15 candidates at the 1964 General Election and managed to capture a 2.4% share of the Scottish poll. This slow, but steady improvement was maintained and at the 1966 General Election, with 23 seats contested, they doubled their share of the Scottish poll to 5%.

The SNP 'breakthrough' came in 1967. In March of that year, the Nationalists came third at the Glasgow Pollok by-election with 28.2% of the poll and in November they won the Hamilton by-election with 46% of the vote. In 1968 these successes were reinforced by considerable SNP gains in the May municipal elections, but in 1969 there was a slight fall back in the Nationalist position as the party machine failed to cope with the increased demands on it.

The 1970 General Election gave the SNP moderate results. Although doubling their 1966 vote to 11.4% of the Scottish poll, the party won fewer votes per candidate, lost Hamilton and gained only a single victory in the Western Isles. By-elections in the early seventies though, saw continuing advances culminating in the winning of Glasgow Govan in November, 1973.

The General Elections of February and October 1974 produced major SNP successes. Although Govan was lost in February, the Western Isles was held and a further six seats were gained. The SNP share of the Scottish vote was again doubled, this time to 21.9%. In October all 71 seats were contested, the SNP vote rose to 30.4% of the Scottish poll, and the total of SNP seats rose from 7 to 11. By 1974 the Scottish National Party had clearly 'arrived'.

The achievement of the SNP in Scotland was not simply an electoral feat. It was seen as a direct challenge to the continued existence of the United Kingdom. Thus, the Nationalists' electoral successes initiated the progressive incorporation of the concept of devolution into the platforms of both the Labour and Conservative Parties. Drucker and Brown comment:

'The job for the British parties, when the Nationalists had established themselves as serious electoral competitors, was at once to regain their own popularity and, thereby, to reassert the dominance of the United Kingdom in the non-English nations. They had to find some way of convincing the Scottish and Welsh people to vote for them again. In the circumstances of the late 1960s this was taken to mean they must learn to portray themselves convincingly to the people of Scotland and Wales as Scottish and Welsh. It would not be an easy task'.³⁶

Accordingly, in May 1968, Mr. Heath asked a reluctant Scottish Conservative Party Conference to consider the case for an elected Scottish Assembly and in August he followed this up by establishing a 'non-partisan' Scottish Constitutional Committee under Sir Alec Douglas-Home. The Labour Government's response was to appoint a Royal Commission to be chaired by Lord Crowther (succeeded on his death in 1972, by Lord Kilbrandon). The Commission's main remit, announced on 11th February, 1969, was 'to examine the present functions of the central legislature and government in relation to the

several countries, nations and regions of the United Kingdom'.³⁷

After some four years the Kilbrandon Commission reported in October 1973. It is generally accepted that the Commission was used by both Labour and Conservative Governments as an excuse to do nothing in face of the continuing Nationalist success. The Report lacked impact because it did not contain a single, agreed set of recommendations. The Majority Report, which itself contained a bewildering array of competing proposals, rejected separatism and federalism and offered Scotland and Wales legislative devolution through directly elected Assemblies. The Memorandum of Dissent, however, favoured uniform treatment for Scotland, Wales and five English regions in the form of seven directly elected Assemblies which would have powers to adjust UK policies to the special needs of their areas.

1974 saw two General Elections and the emergence of the SNP as a major force in Scottish politics. The Labour Government which was returned now had no option but to treat devolution seriously. Their problem lay in constructing and obtaining agreement on any proposals. A series of White Papers, outlining various alternatives and proposals based on the main recommendations of the Majority Report, emanated from the Government between 1974 and 1976 as it tried to thrash out an acceptable formula for devolution. Strong opposition within the Labour Party and the traditional caution of the civil service were proving to be difficult stumbling blocks for the Government in their efforts to get devolution off the ground.³⁸

Nevertheless, a devolution Bill - the Scotland and Wales Bill - containing a version of the ideas proposed by Kilbrandon, was presented to the House of Commons in November 1976. However, the Government was now facing another hurdle - Parliament itself. Drucker and Brown have pointed out that the Government's ability to surmount this hurdle

was limited by two major factors. Firstly, when the Bill approached the House of Commons the Government had only a small overall majority (which it lost before the hurdle was cleared). And secondly, many English Labour MPs did not share the Government's commitment to devolution. They comment:

'Throughout the debate on the Government's proposals embodied first in a Scotland and Wales Bill, and then, when that Bill was abandoned, in separate Scotland and Wales Bills, there was a ghostly presence: English nationalism. The Government was attempting to reconcile the Scots and Welsh to the British constitution. But it could do this only if English MPs - who are, after all, the overwhelming majority of the House of Commons - assented'.³⁹

Under mounting pressure from all sides, and caught in what Gunn and Lindley describe as a 'blizzard of amendments', the Scotland and Wales Bill eventually had to be abandoned after the Government failed to win a timetable motion in February 1977. The original Bill was succeeded in the next Parliamentary Session by two separate and slightly amended Bills - the Scotland Bill and the Wales Bill. The passage of these was scarcely any easier, involving as it did delicate political trade-offs between the Government and the Liberals, but the two Bills did reach the statute book, substantially intact, by the summer of 1978.

Although the substance of the Bills remained largely unaffected, the Government suffered a number of important defeats in Parliament. The most significant of these was the '40% rule'. This required 40% of the electorate in Scotland and Wales to vote 'Yes' in referenda on their Acts.

The referenda were scheduled for 1st March 1979. The Welsh voted overwhelmingly against their Act. Only 11.8% of Welsh voters voted 'Yes'; four times as many, 46.5% voted 'No'; and the rest, 41.7%, stayed at home. The result was overwhelming. In Scotland, however,

the situation was more equivocal - 32.5% voted 'Yes', 30.4% voted 'No' and 37.1% did not vote. The Scots had voted in favour of devolution, but not in sufficient numbers. What happened next had more to do with the Government's survival plan than it did with any concern to salvage devolution. Stall and political bluff became the order of the day as a decision was delayed on the Repeal Order vote and the offer of all-party talks was made. The Callaghan administration, in the midst of its 'winter of discontent', was desperately playing for time in an attempt to achieve a summer election. Patience, though, wore thin amongst opposition MPs, especially the SNP, and after a motion of no confidence in late March, the Government fell, and along with it, devolution.

It is against this background that our case studies are set. From the late sixties onwards British politics moved into a new era as the growth of nationalism spread and the role of Parliament within the centralised British state was criticised. One of the purposes of this thesis is to examine whether in fact Parliament was, as its critics alleged, unable to cope with the demands of Scottish legislation. For instance, did Scotland suffer from unjustifiable 'delays' before it obtained some of these social reforms? The thesis will consider to what extent the Scottish 'political system' was acting 'independently' in dealing with the issues of conscience under consideration and to what extent an element of dependence persisted when the Scottish system came to make demands upon the British system for parliamentary time. Further, the thesis will enquire into the state of public opinion, among the citizenry in general and among specific interest groups, and examine how MPs judged that opinion for themselves. Only then might it be possible to ascertain the relative importance of the factors under discussion.

This chapter has demonstrated that Scotland does not fit neatly into any of the standard categories of political science. It is part of a unitary state yet it maintains a distinctiveness by virtue of a number of its social institutions. Through its historical development a Scottish political culture has evolved which manifests itself in a number of different ways in the everyday lives of the Scottish people. But to what extent Scotland has its own 'political system' is a question which requires further consideration. There is now a need to disaggregate the Scottish 'political system', to explore its component parts, their relationship to each other and to the British system. Our Scottish policy studies will provide an empirical means for doing this. However, before that will be possible it is necessary to examine some approaches to policy analysis through which both policy and the system generating that policy can be considered. Thus, the next chapter will examine some of the relevant approaches.

1. J. G. Kellas, *The Scottish Political System*, 2nd Edn., Cambridge, C.U.P., 1975, p. 18.
2. T. Nairn, *The Break-Up of Britain*, London, NLB, 1977, p. 130.
3. G. E. Edwards, 'The Scottish Grand Committee, 1958 to 1970', *Parliamentary Affairs* 25, 1971-72, pp. 303-325, at p. 322.
4. Kellas, *op. cit.*, p. 2.
5. H. M. Drucker and G. Brown, *The Politics of Nationalism and Devolution*, London, Longman, 1980, p. 7.
6. Kellas, *op. cit.*, p. 4.
7. R. Burnett, 'Scotland and Antonio Gramsci', *Scottish International*, No. 9, Nov. 1972, cited in Nairn, *op. cit.*, p. 132.
8. Nairn, *op. cit.*, p. 129
9. *ibid.*, p. 145.
10. *ibid.*, p. 163.
11. *ibid.*, p. 158.
12. For a typical enquiry see *The Scotsman*, 12th March, 1982, p. 12.
13. J. Brand, *The National Movement in Scotland*, London, Routledge and Kegan Paul, 1978, p. 138.
14. G. Barrow, 'Scotland, the Lopsided Kingdom', *The Scotsman*, 3rd January, 1981.
15. J. Campbell, 'A Billy or a Dan or an Old Tin Can', *The Scotsman*, 17.4.82.
16. C. Smout, 'The Scottish Identity' in R. Underwood (ed), *The Future of Scotland*, London, Croom Helm, 1977, p. 11.
17. Nairn, *op. cit.*, p. 172.
18. For useful general accounts see P. Nettl, 'The Concept of System in Political Science' in *Political Studies*, 14, 1966, pp. 305-38; and T. Parsons, 'An Outline of the Social System' in T. Parsons et al., *Theories of Society*, New York, Free Press, 1961, pp. 30-79.
19. D. Easton, *A Framework for Political Analysis*, New Jersey, Prentice-Hall, 1965, p. 25.
20. *ibid.*, p. 82.
21. *ibid.*, p. 83.
22. M. Evans, 'Notes on David Easton's Model of the Political System', *Journal of Commonwealth Political Studies*, 8, 1970, pp. 117-133.
23. Nettl, *op. cit.*, p. 330.

24. Kellas, *op. cit.*, p. 16.
25. M. Keating, *The Role of the Scottish MP*, Ph.D., 1975, CNAA, p. 15.
26. Kellas, *op. cit.*, p. 38.
27. *ibid.*, p. 209.
28. R. Parry, 'Scotland as a Laboratory for Public Administration',
Paper prepared for the 6th annual conference of the PSA,
United Kingdom Politics Work Group, Glasgow, September 1981.
29. *ibid.*, p. 6.
30. *ibid.*, p. 35.
31. Kellas, *op. cit.*, p. 155.
32. J. Kellas, 'The Political Response' in Underwood, *op. cit.*,
p. 167.
33. C. H. Allen, 'The Study of Scottish Politics: A Bibliographical
Sermon, in *The Scottish Government Yearbook 1980*, Edinburgh,
Paul Harris, p. 27.
34. R. Cook, 'Parliament and the Scots Conscience', in *The Scottish
Government Yearbook 1978*, Edinburgh, Paul Harris, p. 99.
35. L. A. Gunn and P. Lindley, 'Devolution: Origins, Events and
Issues', in *Public Administration Bulletin*, 25, 1977.
36. H. M. Drucker and G. Brown, *op. cit.*, p. 81.
37. Royal Commission on the Constitution, 1968-73, Report, Cmd. 5460,
London, HMSO, 1973.
38. see Drucker and Brown, *op. cit.*, Ch. 8, for detailed discussion.
39. *ibid.*, p. 110.

CHAPTER 2

Approaches to Policy Analysis

I. Introduction

The analysis and comprehension of policies past and present is currently seen by many as central to an understanding of political life. In response to such questions as how policy is formed in political systems various models have been postulated. The purpose of this chapter is to review the current state of policy analysis and to highlight those theoretical ideas which are of particular relevance to our policy studies on Scottish 'issues of conscience'. In the last chapter a need to disaggregate the Scottish political system was suggested. The approaches to be examined here will provide the means by which to explore some of these component parts.

In explaining policy development in the case studies, our approach will be based on Banting's notion that the making of policy is both an intellectual activity and an institutional process. Decisions that influence policy are the products of individual minds in so far as problems must be perceived and defined by individual policy-makers. New policies can then be created on the basis of those perceptions. Yet the making of public policy is also an institutional process whereby policy-makers possess authority to resolve public issues only by virtue of their positions in political institutions. Policy often does change in response to shifting intellectual currents, but institutional realities can impinge upon the extent to which new ideas penetrate the political world and influence public policy. Thus, policy innovations can also be the outcome of political conflict and of bargains struck between established political interests.

In the following section (Section II) the debate between the 'rationalist' and 'incrementalist' approaches to policy analysis will

be reviewed. It will be suggested that much of this debate is in fact sterile, because there is a confusion between real and ideal states of affairs. As the two models address essentially different social phenomena there is a need to distinguish between their explanatory (descriptive) and normative (prescriptive) values. It is because this distinction is rarely made that the debate can be viewed as 'artificial'.¹

The need to distinguish between policy analysis as a means of assessing the cost and consequences of given alternatives and policy analysis as a scholarly pursuit for increasing the understanding of political reality has been highlighted by Richard Simeon.² The emphasis in this chapter will be upon the latter type of analysis. The following sections will outline a number of approaches through which it will be possible to explain why in the case studies certain policy alternatives were chosen and others were not.

Thus Section III outlines a systems approach which provides a starting point from which to explore a number of different perspectives on policy analysis. Working from the proposition that there is no one best way of explaining how policies evolve, it attempts to develop a combination of approaches which will assist in identifying the balance of forces which prevail in the different phases and different types of policy which are to be examined.

Section IV goes on to examine group theory and demand regulation. Here it is noted how the 'package' of interests associated with a particular policy option can affect whether that option is adopted or rejected. Also since groups do not have uniform status consultation is not always equitable. Various 'rules of the game' emerge to govern the relationship between organisations and the bureaucracy and to regulate demands. In this way the bureaucracy itself, being in a pivotal

position in the channel of communication, can influence inputs into the policy process.

This leads on in Section V to agenda management and non-decision making. The section looks at how the political agenda is set and asks not only why some issues emerge, but also why others do not emerge. Here the concept of 'non-decision making' is introduced. This widens the scope of the analysis and allows the more covert aspects of politics to be examined.

Closely related to this is the question of values in policy formulation. Section VI addresses itself to this issue, examining the way in which problems are identified and defined. There is a need to establish whose definitions of social reality are embodied in policy determination. Such a perspective seeks to explain the development of policy in terms of the meanings actors attach to social situations and to their own actions. Thus the 'assumptive world' of political actors is an important explanatory factor in understanding how policy priorities are determined.

Finally, Section VII will endeavour to draw together some of the themes outlined in the previous two chapters, that is, to relate some of these approaches to policy analysis to the Scottish context.

II. Rationalism versus Incrementalism : An Artificial Debate?

Those who adhere to rationalist analysis defend its utility on several grounds.³ Rationalist analysis, it is argued, promotes a systematic and orderly approach to the study of policy problems which is essential because of the contentiousness of policy issues, the vast amount of data that may be involved, and the need for a rigorous form of analysis to simplify complex reality for decision-makers. As political issues seldom emerge cut and dried and ready for debate this

systematic approach helps to define the problem, and indeed, redefine the problem as more facets of it become apparent. It can generate improved efficiency by bringing to the attention of decision-makers costs and benefits which otherwise might have gone unnoticed. Thus, it can help articulate and clarify the range of practical choice and the consequences of various political choices. On this Michael Carley contends:

'... rational analysis promotes explicitness in presentation of data basic to a problem and in causal linkages and transformations postulated in the analysis. This reduces the incidence of hidden value judgements, the effect of fashion in problem resolution, and the incidence of implicit causality in the form of tenuous causal relationships which may pervade less rigorous forms of analysis'.⁴

The rationalist approach then, purports to offer a framework which is at one and the same time both explanatory and normative. The approach though, is not without its critics. Smith and May have usefully summarised some of the main points of criticism made against the rationalist case.

It is often regarded as being too narrow in the sense that it neglects a whole range of political variables which limit the extent of choice available. Constraints in the form of pressure groups can impinge upon the decision-maker's environment restricting the consideration of possible policy options to those generally acceptable to the interests involved.

The approach is also seen as utopian since most policy decisions have numerous unanticipated consequences which are not as inconsequential as the model tends to imply. Smith and May suggest that 'in the real world ... ends are not that clear, decisions are not that neat and evaluation is not that systematic'.⁵

Further, there is the suggestion that the approach is value biased as opponents dispute that rationality, in itself, represents some universal good. Within an organisation there can be a tendency to equate rationality with the smooth running of the organisation itself. Thus, it is argued that rationalist analysis favours the values of management and senior professions to the detriment of lower ranking staff.

Another criticism levelled against the rationalist approach is that the distinctions it draws between ends and means, values and decisions, and facts and values are too sharp. As Smith and May point out, what counts as 'fact' often tends to be subject to the interests and values of the parties involved and they regard the ambiguity of means and ends as substantially greater than the rational model allows, a point originally made by Lindblom who contended that means and ends are very often chosen simultaneously within the policy process.

Finally, critics hold that the rationalist model is impractical since a review and evaluation of all possible answers to a problem in order to select the optimal solution is seldom feasible. Even in situations where it might be possible, the cost of the search may well exceed the savings achieved by the solution eventually discovered.

On the other hand, in the incrementalist model the policy-maker chooses as relevant objectives only those worth considering in view of the means actually at hand or likely to become available. Charles Lindblom and David Braybrooke state:

'While the conventional view of problem solving is that means are adjusted to ends (policies are sought that will attain certain objectives), it is a significant aspect of policy analysis as actually practiced that, in certain specific ways, the reverse adjustment also takes place. Since the

reverse adjustment is superimposed on the conventionally conceived adjustment of means to end, the net result is a reciprocal relationship between means and ends or between policies and values that is different from that envisaged in the synoptic ideal'.⁶

In this model the decision-maker starts not with some ideal goal but with the policies currently in force and decision-making entails considering only incremental change, or changes at the 'margins'. The number of policy alternatives reviewed is restricted and only a limited number of consequences are envisaged and evaluated for any given alternative. What constitutes 'the problem' is constantly subject to redefinition in light of available means to solve it and in this manner the subject of the decision may be transformed and reinterpreted through the analysis. Thus evaluation is not viewed as a separate activity but as taking place in series with decision-making. The strategy is 'disjointed' as Braybrooke and Lindblom explain:

'Analysis and evaluation are disjointed in the sense that various aspects of public policy and even various aspects of any one problem or problem area are analyzed at various points with no apparent co-ordination and without the articulation of parts that ideally characterize sub-division of topic in synoptic problem solving'.⁷

Disjointed incrementalism then, takes into consideration the limited cognitive capacities of decision-makers and the inevitable requirement to limit the scope and cost of information collection and compilation. However, this approach too has been subjected to a number of criticisms. These have emanated principally from Yehezkel Dror and Amitai Etzioni.⁸

Dror's main accusation against the approach is that it is 'conservative', offering a rationalization for inertia. Further, the model is criticised for being unjust since 'good' decisions are assessed not by some objective criterion but simply by their acceptability in a

particular situation.

Etzioni's main criticism is that incremental decisions take place within the context of more fundamental decisions and that the approach has little to say about how decisions of this more fundamental kind are made. Although incremental decisions greatly outnumber fundamental ones, the latter's significance is not commensurate with their number. Hence it is a mistake to relegate non-incremental decisions to a category of exceptions.

To counter these criticisms, and also to meet the ones made against the rationalist model, both Etzioni and Dror have outlined their own models which purport to offer a 'third' alternative by seeking to combine the strongest features of each of the two opposing schools of thought. Etzioni advocates a 'mixed-scanning approach', while Dror suggests a 'normative-optimum model'.

Criticisms of both these alternatives have been made by Smith and May. The important point to note though is that the shortcomings of rationalism and incrementalism are not necessarily overcome by these 'third' approaches.

It will be argued here, in agreement with Smith and May's thesis, that the debate between the various schools of thought on policy-making is in certain important respects somewhat artificial on the grounds that it is not at all clear that the protagonists are actually arguing about the same thing. Smith and May, in fact argue that 'in spite of prolonged dissension between rationalist and incrementalist models of decision-making, both they and the several versions of a rapprochement, have in common epistemological features the significance of which outweigh any specific points of variance'.⁹ Elsewhere Richardson and Jordan have also emphasised 'the remarkable agreement between both approaches on the description of how policies are actually

made. The "rationalists" might at times wish to change the policy-making process, but their description of existing practices is at times very near to that offered by Lindblom'.¹⁰

A prominent feature of all the models is that they should serve both explanatory and normative purposes. However, as Smith and May argue, it is anomalous to presume a priori that 'is' and 'ought' in modes of decision-making correlate. They feel that the authors who adopt this position do not explain at all clearly how a model is supposed to serve simultaneously as an accurate description of how decisions are made and as a description of how they might be made differently by way of improvement. Consequently, it is suggested that different frameworks may be required for explanatory and normative discussion (although this is not to say that explanatory social research can have no prescriptive policy implications). As the debate is currently structured, concepts in use for analysis and practice are confused. One way forward is the idea that contributors to the debate are arguing about different kinds of things and that as such the term 'decision-making' is 'in danger of being applied insensitively to a variety of phenomena and to confusing effect'.¹¹

This point has also been emphasised by Simeon who considers it important to rescue the study of policy from what he calls the 'technologists' whose main concern has been to develop aids to assist official decision-makers make 'better' decisions. In such a view policy making is essentially a technical question, a matter of developing more systematic means to canvass alternatives, assess costs and benefits, and implement choices. This approach is prescriptive since it seeks primarily not to explain how or why decisions are made, but to prescribe more effective ways of doing it. In this light, he stresses, it is essential, for a proper understanding of politics generally, to

distinguish between 'policy analysis' which involves advice on the choosing of alternatives (i.e. prescription), and 'policy theory' which involves the explanation of why certain alternatives are chosen and others are not (i.e. description).

Smith and May wholeheartedly concur that there is a very definite need to make such distinctions in the discussion of policy analysis. It is upon the need to differentiate between prescriptive policy analysis and descriptive policy analysis that they base their case that the debate between rationalism and incrementalism is essentially an artificial one.

Rationalism, it is argued, is commonly held as an image of ideal decision-making procedures. As Gordon et al have noted, 'the main explanation for its continuing existence must lie in its status as a normative model and as a "dignified" myth which is often shared by the policy-makers themselves'.¹² The criticism of it centres on the fact that rationalistic models are empirically inaccurate, or unrealistic. 'That is not the way things are'. On the other hand there is a degree of sympathy for the view that the incrementalist approach has much validity as an empirical model of how policies are actually made. Here criticism focuses on the claims of this approach to be useful normatively. 'That is not the way things should be'. Thus Smith and May argue:

'Now viewed in this light it can be seen that the debate between rationalistic and incrementalist models is artificial in the sense that it is based on ... the confusion of comparing real with ideal states of affairs and expecting them to be the same. The two models are about different social phenomena and as such should seek to perform different functions. We should not expect them to agree. ...The problem is not to reconcile the differences between contrasting rational and incremental models, nor to construct some third alternative which combines the strongest features

of each. The problem is to relate the two in the sense of spelling out the relationship between the social realities with which each is concerned'.¹³

Smith and May are therefore pushed towards the conclusion that we require more than one account to describe all the different aspects of policy-making and organisational life. This idea is becoming increasingly popular in much of the newer policy literature where a combination of approaches is being utilised to explain policy developments. Simeon, for instance, states that 'no one single clear and simple explanation of something as many faceted and as huge as modern government is likely to be possible'.¹⁴ He suggests that rather than search for a very high level of abstraction and one or two 'crucial' variables, our conception should allow us to group and make sense out of a wide variety of determinants of policy. A similar sentiment is echoed by Keith Banting who contends that:

'our understanding of policy determinants can be refined further by abandoning the assumption that there is a single "policy process" operating identically throughout an individual policy change and over all policies'.¹⁵

He points out that the balance of forces at work seems to differ systematically in different phases of the process and in different types of policies. This is endorsed by Lorna J. F. Smith in her study of law emergence. She suggests a conceptual scheme which would permit the location of different types of law emergence on a policy continuum, their position being dependent upon whichever theory had most explanatory power for that particular example.¹⁶ And W. I. Jenkins is also convinced that there is no one best way to analyse policy since 'the nature of the policy problem is such that a variety of approaches are required to deal with the complexity of the process'.¹⁷ In support of this he cites a significant statement from J. E. Anderson:

'Each (of the models) focuses attention on different aspects of politics and policy making and seems more useful for some purposes or situations than others. Generally one should not permit oneself to be bound too rigidly or too dogmatically to a particular model. ... It is my belief that the explanation of political behaviour, rather than the validation of a given theoretical approach, should be the main purpose of political enquiry and analysis'.¹⁸

It is this theme then, and the line that any analysis of policy and the policy process can only be achieved through the linking of a number of different perspectives, that will be pursued for the remainder of this chapter.

III. A Systems Approach

A systems approach can be a useful means by which to link a number of different perspectives on policy analysis. The approach provides a way of organising empirical material so as to highlight the inter-related nature of certain political phenomena. In this respect, a systems framework can act as a starting point for more detailed analysis of particular parts of the policy process.

Simeon has made reference to the fact that policy-makers work within a framework which greatly restricts the alternatives they consider and the range of innovations they make. He comments:

'This framework, or set of constraints and opportunities, defines a set of problems considered to be important, a set of acceptable solutions or policy responses, a set of procedures and rules by which they will be considered. The framework is made up of various characteristics of the broad social and economic environment, the system of power and influence, the dominant ideas and values in the society, the formal institutional structures. The policy process itself - the interaction of formal and informal actors such as politicians, bureaucrats, pressure groups, and the media bargaining with each other - reflects and is shaped by this broader framework and by the pattern of problems, precedents, and policies received from the past'.¹⁹

One of the earliest exponents of the systems approach was David Easton and his model is often taken as the foundation upon which to build a more sophisticated account.²⁰ This approach views the policy process in terms of an input-output model, the focus being placed on the dynamics and processes of the political system in its environment. Differentiation is made between policy demands (demands for action arising from both inside and outside the political system), policy decisions (authoritative decisions by the political authorities), policy outputs (what the system actually does - e.g. provide goods and services) and policy outcomes or impacts (intended or unintended consequences resulting from political action or inaction).

In this way it becomes possible to explore the process of policy formulation and implementation. Using Easton's terms, the present study focuses on policy demands and policy decisions. Although Easton's original model is perhaps a little too neat, via systems approaches, policy analysis can be seen to involve disaggregating and understanding the specific policy related aspects of the political process. What is required is the development of a more extensive perspective and this has been provided by Jenkins. In the exploration of the policy world Jenkins is of the opinion that an extended systems framework can act as a useful heuristic map - useful in alerting one to areas that need more attention (e.g. the environment, the political system) and useful in emphasising links on which theory could be usefully brought to bear (e.g. the extent to which the political system itself controls inputs rather than inputs determining political action).²¹

What then, are the areas in our case studies which might benefit from a more detailed examination? One area is the interaction between the political system and the environment. To understand the continual interplay between the two one has to understand the balances of power

and control which operate at any time. So what political authorities *do not do* may be as important as what they *actually do* in explaining either the presence or absence of popular mobilisation and the varying articulation of demands. Policy is not always a simple response to articulated demand and therefore the question of how policy emerges may only be properly understood by charting developments over time, a move towards a dynamic perspective within which suppressed issues may be found to be more common than at first appears.

Another area requiring more detailed exploration is the behaviour of individuals both within and without the political system. As Jenkins observes:

'To explain policy we need to explain behaviour and the constraints that impact upon it. We need to identify actors and organisations and study their interactions. In particular we are concerned with political behaviour taking place within and amongst organisational networks'.²²

Accordingly, the approach to be adopted here will focus both on the internal dynamics of the political system itself and on the interaction of the system with its wider environment. It will view the essence of analysis as investigation of what goes on, or what does not go on, inside the 'black box'. Chris Ham has endorsed this approach, commenting that 'policy analysis, like social policy, is an eclectic field of study rather than a distinctive social science, and as well as drawing on political science, it derives much of its intellectual basis from sociology and organizational theory'.²³ A primary concern then, lies with the actors and organizations involved in the initiation, formulation and implementation of policy.

Hence, to the process of issue resolution. How do people organise and how do they relate to the political system? What influences the nature and volume of demands and how does the political system deal

with shifts in demand patterns? Why do certain issues gain precedence over others and to what extent are the outcomes of policy decisions related to the form of decision structure by which they are processed?

IV. Group Theory and Demand Regulation

Advocates of group theory would suggest that the interplay of group pressures is the dominant feature of the policy process. They contend that a proper understanding of the ways in which issues arrive on the political agenda, the ways in which policies are decided, their content, and subsequent implementation, can only be reached by reference to the group system. However, group theory, in its unadulterated form, has a tendency to overstate the importance of groups and to understate the importance of other factors such as ideology, reason and individual initiative in the policy process. It is thus rather misleading and inefficient to try to explain politics or policy formation solely in terms of group struggle. So in keeping with the theme developed so far, that there is no one best way to explain the policy process, it will be contended here that this sort of reductionism, or unicausal explanation, should be avoided.

Nevertheless, group theory is a useful analytic tool for focusing attention on *one* of the major elements in policy formulation.

Richardson and Jordan's account of what they describe as British 'post-parliamentary democracy' offers some interesting insights into pressure group politics.

They argue that as the matrix of competing group interests becomes more complex, public policies increasingly become the products of the balance of power between groups at any given time. This configuration of group interests varies over time as groups gain and lose power and influence on issues, so that public policy will generally reflect the

interests of the current dominant groups. Every government is influenced in its choice of policy options by the 'package' of interests associated with them. In this sense pressure groups do not each relate to government in isolation. Their interests and objectives overlap, compete with and stand in opposition to each other. In forming alliances groups may increase their influence although they may be forced to modify their position on the issue at stake. In competing for influence groups may neutralise each other and can give political leaders the opportunity to enforce compromise or to follow their own preferred line of action. Pressure groups may restrain policy-makers, but the very number of groups active on some issues may also free policy-makers to select and manipulate the interests to which they ultimately respond. As Hall et al. comment:

'A group's ability to influence government is determined by the way in which its demands can be presented as well as by the number and prestige of its supporters. To present demands publicly and forcefully as a means of advancing the collective good can oblige authorities to take notice of them. Government is particularly vulnerable to such a line of argument precisely because it relates to what is seen as one of its primary functions. Yet the main point remains: governments underpin their specific support by amassing diffuse support'.²⁴

Divisions *within* groups can also have an effect on group influence and activity since they may result in a change in objectives or alter the style adopted by group leaders. These divisions reflect the differing interests and opinions of members and generally the wider the 'interests' a group seeks to represent the more difficult it becomes for the group to adopt any clearly defined policy objectives. Also, the initial consensus upon which a group may be founded can be seriously threatened, and may even evaporate, as members become more politically aware and astute through exposure to the policy

process itself and pressure group politics generally. We will see a particularly good example of this later in the case involving the Scottish Homosexual Rights Group (formerly the Scottish Minorities Group). It is important to stress then, the considerable importance of internal group politics in determining group behaviour (especially over time). Some instances of group activity can be best understood by reference to the group leaders' need to maintain internal cohesion rather than by their desire to influence aspects of public policy.

Not only are pressure groups in competition in Richardson and Jordan's account, but so are 'official' organisations like government departments which they see 'as behaving in almost exactly the same way as more conventional external pressure groups'.²⁵ Here Richardson and Jordan draw attention to the internal divisions within government itself and emphasize the degree to which 'government' is plural and not singular. They suggest that central government departments, whilst often being the target of external pressure groups, are also playing pressure group roles themselves - 'Understanding the divided nature of the centre and the manner in which policy is handled permits the crucial understanding that pressure groups can be - and ... often are - allies of departments'.²⁶

The focus is placed on a government - civil service - pressure group network in which policy-making is fragmented into sub-systems where conceptual distinctions between government, agencies and pressure groups are broken down. Richardson and Jordan suggest that the boundaries between government and groups are becoming less distinct through a whole range of pragmatic developments so that policy is 'being made (and administered) between a myriad of interconnecting, interpenetrating organisations'. They contend that:

'it is the relationships involved in committees, the policy community of departments and groups, the practices of co-option and the consensual style, that perhaps better account for policy outcomes than do examinations of party stances, of manifestoes, or of parliamentary influence'.²⁷

It was suggested in the last chapter that this was particularly true of the Scottish Office. The case studies will consider this.

With the increasing specificity of government decisions the consultation process increased in importance during the 60s and 70s. A number of reasons can be offered for this, such as a lack of confidence by civil servants in their own legitimacy to enforce decisions; a realisation that implementation of policies was affected by a cooperation (or lack of it) by groups; a recognition that in other aspects of the subject or at other times the department would depend on the interests for political support, and in policy implementation or the provision of detailed information; and a desire to maintain professional relations with the officers of relevant groups. It should be noted, however, that the present Conservative administration does not view this matter quite in the same way as preceding governments. Since Mrs. Thatcher took office the tendency has been towards less consultation and less reliance on 'consensus politics'.

Consultation is not always equitable since groups do not have uniform status. Some principal 'inside' groups will be granted automatic consultative status while lesser 'outside' groups will be unable to obtain (or may reject) such a close relationship. Richardson and Jordan make this distinction between 'groups that are invited by central government departments to submit their views on topics related to their concerns and those that are at best tolerated to the extent that they are allowed to send occasional deputations'.²⁸ In a certain sense, it is suggested, consultation can even be a process of exclusion

whereby consultation beyond a recognised 'core' of groups is more a matter of disseminating information rather than of receiving views. In the case study on liquor licensing it will be observed how certain established groups were granted this automatic consultative status.

There can be a problem here though, because if one views political life and the policy process as increasingly a struggle between competing groups and between these groups and the government, then it becomes difficult to make a clear theoretical distinction between the government on the one hand and groups on the other. This difficulty is met by Richardson and Jordan with the argument that although the apparatus of the state exhibits many of the characteristics of groups outside the structure of government, government institutions are often in a privileged position vis-a-vis non-governmental groups and can be distinguished from what are normally regarded as pressure groups by the characteristics of 'officiality', 'authority' and 'legitimacy'. The designation 'official' indicates that the government is 'authorised' by social understanding ('legitimacy') to exercise certain powers against and over all other groups and individuals in society.

The government then, has authority in its role as a regulator of demands. It can assess the feasibility, political attractiveness and ideological appropriateness of issues. It can reject or accept them on these grounds and can indicate to those who present proposals what is likely to find favour and gain support. However, demands present each government with a dilemma. If it is not to lose its support in the community it must respond to some of them. Yet the number and complexity of demands will almost certainly be too great for all of them to be met. Demands have to be managed since the resources needed to meet them, such as finance, manpower, expertise and parliamentary

time are always scarce.

Hall et al argue that demands are regulated by 'gatekeepers' - interest groups, political parties, legislators and administrators - who process demands at given points through a hierarchical chain in the political system. Two important points are raised here by Hall et al. The first concerns the prevailing 'values' in the political system -

'The gatekeepers of the political system are not simply reducing demands to manageable proportions in a random way; they are making and transmitting judgements about what demands can appropriately be made on government via that particular channel of communication'.²⁹

The second point concerns the way in which the political system can exercise control over demands:

'Demands that relate to similar problems are grouped, co-ordinated and consequently become an amalgam of policy proposals. This reduction of demands not only removes some of the pressure from the political process, it also greatly increases the chance of the composite demand being accepted by the authorities. For the demands are not only reduced, they are also tailored to meet the authorities' needs and interests. Policy proposals are shorn of some of their most contentious features, compromises are made to satisfy different interests and emphases are changed to maximize the appeal and feasibility of a policy, or to minimize the loss of support it will produce'.³⁰

Examples will be seen in all three cases of how some of the more contentious proposals were 'reduced' in this way.

A relatively stable set of rules can emerge in a political system through which organisations and individuals interact in regulating demands. Although for the most part unwritten, these principles can effectively govern the relationships between political actors in their struggle for power. Once established and backed by precedent they can, in part, determine the sources, kinds and uses of power considered to

be appropriate in political life.

An important factor in setting these 'rules of the game' is the bureaucracy itself. Civil servants are the main channel of communication between interest groups and government and they are not only aware of administrative constraints within government but also the constraints imposed by these external groups. They therefore give expression to the limits within which policy-making operates. Being in a pivotal position in the channel of communication it is possible for them to reflect their own policy preferences, through manipulation of the information they either release or withhold from decision-makers.

Jenkins has made the observation that the administration is one of the least explored areas of policy studies. He writes:

'The cubicle of the bureaucrat has indeed remained securely locked, while the faceless men rarely feature in any research findings. Such a state of affairs may be explicable in terms of methodological difficulties but has little theoretical justification'.³¹

He suggests that the bureaucracy can control the entry of demands into the political system as well as being involved in the formation of policy and the way in which policy is implemented.³² Such control need not necessarily be overt, but may be circumstantial in the sense that administrative 'style' may influence policy. Our case studies will examine to what extent this is true of the Scottish Office.

Implicit in the consideration of the question of where and how policy issues originate and how they are regulated is the question of who decides that some issue is a problem requiring governmental action and by what criteria? It has been noted that government departments do not merely react to outside pressures. They plan their interventions with regard to numerous factors and, to a certain extent, move

ahead of interest groups and other pressures on some issues whilst responding slowly, if at all, on others. Priorities therefore, have to be set against some standard. But since issue definition is neither perfectly efficient nor value free 'it is important to know who makes the decisions about how a problem is to be defined, which possible solutions are to be studied, which aspects of each are going to enter the calculation of merits and defects and how they are going to be weighted'.³³ In other words, *how is the political agenda set and what values are involved?*

V. Agenda Management and Non-Decision Making

Tackling this problem not only raises the question of how issues emerge, but also how they do not emerge. Thus, as well as considering how issues arrive on the political agenda it is equally important to consider why some issues fail to reach the agenda, are delayed on their way there, or are removed from it after having arrived. Of central importance is the extent to which policy making itself can be avoided and resisted by those in (and out of) government.

Concern with the presence or absence of items on the political agenda brings into consideration the extensive debate on the nature of political power and conflict. This controversy revolves around the nature of power and who, if anyone, has it. The debate has been raging for over two decades and is a product of the dispute between 'elitists' and 'pluralists' in the U.S. Not all the aspects of this complex debate need concern us here, but one concept which has emerged and is of particular relevance in explaining some of the events in our cases studies is the concept of 'non-decision-making'.

An oft-quoted reference on 'non-decision-making' is Schattschneider's comment on the 'mobilisation of bias'. His central thesis was that:

'All forms of political organisation have a bias in favour of some kinds of conflict and the suppression of others because organisation is the mobilisation of bias. Some issues are organised into politics while others are organised out'.³⁴

From this notion Bachrach and Baratz went on to develop the concept of two faces of power.³⁵ The pluralists, it was argued, by concentrating on issues that generated open conflict of interest, were ignoring a vital element in the power structure - the power not to make decisions. Power had two faces they said. One was the overt struggle as viewed by the pluralists and the other, overlooked in the pluralist model, was the mobilisation of bias within the system to keep issues suppressed or to prevent their being raised at all. The 'other' face of power then, took into consideration not only issue emergence, but also non-emergence or 'non-decision making'. Bachrach and Baratz argue:

'Of course power is exercised when A participates in the making of decisions that affect B. But power is also exercised when A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to A. To the extent that A succeeds in doing this, B is prevented, for all practical purposes, from bringing to the fore any issues that might in their resolution be seriously detrimental to A's set of preferences.'³⁶

Researchers, then, should interest themselves as much in those areas where decisions are not made as where they are made. To ignore non-decision making is to neglect one whole facet of power. Here Bachrach and Baratz point to the possibility that an individual or group may participate more vigorously in supporting the non-decision making process than in participating in actual decisions within the process. To measure relative influence solely in terms of the ability to initiate and veto proposals, they argue, is to ignore the possible



exercise of influence or power in limiting the scope of initiation. Later, in our policy study on Scottish homosexuality we will consider to what extent this can be substantiated.

Perhaps the most widely known study of agenda control is Crenson's study of the politics of air pollution in two U.S. cities.³⁷ Although the industrial cities of Gary and East Chicago standing side by side on the shores of Lake Michigan were faced with similar air pollution problems, they exhibited marked differences in the way in which they dealt with them. While East Chicago passed legislation controlling air pollution in 1949, it was not until the mid-50s that air pollution became a public issue in Gary. Crenson's explanation was that industrial interests in Gary were more influential in preventing air pollution becoming a public issue than were industrialists in East Chicago. The subtlety of Crenson's analysis lies in his argument that it was not simply a case of the industrialists in Gary applying pressure, it was more a case of the mere existence of the industrialists influencing the actions of decision-makers. Thus, it was held that a group could exercise influence simply by being there; they did not necessarily have to take any action. Hence, the conclusion was that decision making activity could be restricted by the process of non-decision making and that the power and reputation of certain people within a community could deter action on sensitive or politically unprofitable issues.

Governments too can limit the scope of initiation through their influence over the content of the political agenda. Stringer and Richardson have drawn attention to this notion of 'agenda management'.³⁸ They suggest that, through conscious agenda management, policies may be formulated simply in order to remove an issue from the political agenda and without any attempt to solve the problem. A distinction

is made between the process of agenda management as a response to a situation in which the problem has already 'arrived' and that which seeks to prevent an issue from arriving on the political agenda at all. For instance a problem can be excluded from the political agenda by understating its extent, e.g. it is generally accepted that official statistics on drug addiction do not fully reflect the severity of the problem. Alternatively, once a problem has 'arrived' they say, some form of governmental response becomes necessary, 'even if that response is only to redefine the problem in order to make it disappear'.³⁹ An example here concerns environmental protection. Regulations for heavy goods vehicles can be manipulated to allow heavier lorries onto the road. In this way many 'problems' can be removed simply by redefinition.

The utility of the concept of non-decision making, however, is not universally accepted. Critics argue that it is more a theoretical illusion than fact, an unnecessary and erroneous concept which is impossible to test empirically.⁴⁰ Wolfinger, for example, suggests that the core of the problem is the difficulty of identifying non-decisions, 'which seems generally to come back to determining people's "real interests", as opposed to what they say they want or what they are trying to get through political action'.⁴¹ Further, he argues that in a number of important respects the criteria Bachrach and Baratz propose require data that are difficult or impossible to obtain. Examples of such impracticable requirements include measuring politicians' anticipations of responses to alternative courses of action; defining abstention in such a way as to distinguish it from apathy or unwillingness to participate; assessing the impact on participation and on the distribution of governmental benefits of alternative values, procedures and institutions; and identifying those responsible for

contemporary values, procedures and institutions.

Similarly, Debnam doubts whether the concept has any empirical value, since Bachrach and Baratz do not establish objective criteria for identifying non-decisions. As for Crenson, Debnam feels that his definition places too large an area of public discussion into the 'non-issue' category. Accordingly there is a need for more selective criteria to determine what topics are kept off the political agenda through non-decision making. He argues:

'After all, every issue, whether eventually successful or not, must go through some perinatal obscurity. We have no means of determining that the alleged nondecision has been kept out and is not, in fact, going through a lengthy process of legitimation. Drawing the political boundary in one place rather than another has the effect of creating two classes of event where there may be only one ... If Crenson wishes to establish the lexical convention of calling neglected or nascent topics 'non-issues', there can be no objection. What is objectionable is the claim that this provides a new and empirically viable form of political analysis'.⁴²

Consequently, Debnam is drawn to the conclusion that the concept 'non-decision' offers nothing that is not already available through decision-making analysis.

Needless to say, Bachrach and Baratz are not inclined to accept this conclusion since they feel Debnam seriously misconstrues the nature of non-decision making. They are concerned about how techniques of decision-making analysis can adequately serve to identify non-decisions, when the concepts of decision-making and non-decision making are grounded upon different and conflicting assumptions - assumptions pertaining to the scope and openness of the political arena, the genuineness of consensus, the neutrality of political institutions, and the concept of interest. By trying to rule out the phenomenon of non-decision making and by limiting the scope of enquiry to what is

empirically determinable, Debnam they say, runs the risk of seriously misrepresenting political reality. The way out of the problem, they concede, will be distasteful to empiricists.

'It is to adopt an analytic model that incorporates hypotheses which, while difficult to verify empirically, compel the investigator to explore a broader range of aspects of the polity within a power context. The product of the research may well be impressionistic or ill-supported by data, but better this than compounding the error by ignoring altogether the elusive elements'.⁴³

Frey, in a review of issues and non-issues, tends to come down in favour of such an approach, but not without some qualification. 'Intuitively', he remarks, 'it seems that Bachrach and Baratz spotlight an absolutely vital area for investigation'. To him two initial impressionistic judgements seem valid - that there are at least some settings of significance in which such implicit or covert aspects of politics are crucial and that these latent aspects of politics are sufficiently pervasive to necessitate political science developing an adequate capacity for their empirical research.

In this area Steven Lukes has further refined the theory of non-decision making, but far from making it easier to research empirically, his conception increases the complexity of the analysis by adding another 'dimension' to it.⁴⁴ Lukes has considerable sympathy for Bachrach and Baratz's theory of the two faces of power, but feels that it does not go far enough. He suggests that the power to control the agenda of politics and exclude potential issues should also be seen as a function of collective forces, and that while organisations are made up of individuals, the power they exercise should not be conceptualised solely in terms of individuals' decisions or behaviour. Further, the emphasis which is placed on cases involving actual conflict tends to ignore the important point that one of the most

effective uses of power is to prevent conflict from arising in the first place. So Lukes is unwilling to accept that actual conflict is essential to power. From this he moves to what he terms his 'three-dimensional view' which recognises that power may be exercised through collectivities, may involve inaction rather than observable action and may be exercised unwittingly.

While Lukes' analysis gives the concept of non-decision making a greater theoretical sophistication it also poses even greater empirical research problems in that it raises the difficulty of identifying a latent conflict involving a contradiction between the interests of those exercising power and the 'real interests' of those they exclude. But Lukes' contribution is of importance in that it demonstrates the need to examine how demands are prevented from being raised, the need to explore non-decision making outside perceived and overt conflicts, and the need to consider institutional as well as individual power.

'As a concept, non-decision is frequently much like quicksand', says Jenkins. 'May it, at one and the same time, mean everything and nothing?'⁴⁵ His contention though, is that given the work of Crenson and of Bachrach and Baratz, it is possible to raise the status of non-decision from that of a critical idea to that of a manageable concept applicable to policy studies. While recognising the caveats of the pluralist critique he argues:

'The adoption of a non-decision perspective offers scope for a wider and more searching analysis of the policy arena. In particular, it demands that the investigator step back and probe in greater depth "the world taken for granted", without becoming ensnared in the false consciousness debate which a total acceptance of Lukes' analysis might involve'.⁴⁶

In this respect then, policy analysis has to broaden the scope of its activity and realise that values can be of paramount importance in decision-making. A focus on non-decisions, therefore, can be linked with a focus on values and policy content by posing wider questions regarding actions and inactions within the political system. As Jenkins rightly concludes, 'non-issues, non-decisions and even non-policies are necessary and legitimate subjects for examination'.⁴⁷ The relevance of this idea will be considered in our policy studies, especially the case on homosexual law reform in Scotland.

VI. Values in Policy Formulation

Questioning what happens to inputs on their way to becoming outputs, why some issues make it and others do not, why some are substantially changed while others are merely ratified, leads on to another thorny problem in policy analysis - the issue of values. Here Rakoff and Schaefer postulate that what enters the political process, the so-called black box, 'is not a single, unambiguous demand from the environment, but a complex of conflicting demands derived from the differing perceptions that individuals have of the environment'.⁴⁸ Numerous examples of this are to be found in the case material where frequently different pressure groups would have different perceptions of the same issue.

Carrier and Kendall make a very similar point.⁴⁹ They advocate the need to examine the processes involved in the creation of 'social problems', that is problem identification and definition, by considering the possibility that there may not be a consensus about whether a social phenomenon is a 'social problem' and also that even where such a consensus exists the exact 'nature' of the problem may be in dispute.

They suggest that in policy analysis one ought to take into consideration the processes involved in the 'creation and sustaining of social reality' (i.e. how a social phenomenon becomes classified as a social problem?) and the possible existence of an infinite variety of social realities (i.e. the variety of interpretations of any one social phenomenon which can lead to one man's social problem being another's satisfactory situation).

This perspective seeks to explain the development of policy in terms of the meanings actors attach to social situations and account for how these meanings are generated and sustained. In such a scheme the important thing to establish is whose definitions of social reality are embodied in policy determination. By establishing this, recognition can then be given to the different frames of reference and the different perspectives on the issue at stake. It is then the participants' explanations of why things happened as they did and why certain decisions were taken (and indeed, not taken) that becomes of importance. In this way Carrier and Kendall look to build up a range of plausible accounts which will offer different viewpoints of the same situation. The benefit of phenomenology, they claim, is that it offers insights into a particular development which otherwise might not have revealed itself had a single perspective been adopted. The empirical data derived from our interviews with MPs demonstrates this point nicely.

This idea that the meanings political actors ascribe to their own actions is of importance in explaining policy formulation has been further developed by Ken Young.⁵⁰ He suggests the concept of 'the assumptive world' as a means for examining policy-makers' 'values'.

The assumptive world is composed of four interdependent and inseparable elements - the cognitive (existential, perceptual), the

affective (or evaluative), the cathectic (or relational), and the directive (or intentional). These refer, respectively, to man's ability to recognise the facticity of his world, to evaluate aspects of that facticity, to feel himself to be connected to and bound up with it, and to be moved to act upon it.

The assumptive world is also organised hierarchically. Ideology is taken as the generalised symbolic representation of the world and our relation to it; attitudes represent middle range constructs for managing the world presented to us; and opinions are the circumstantial and specific responses to the everyday world we encounter. Lower level opinions, beliefs or dispositions in part derive from, and may be validated by, the more fundamental aspects of culture and personality. Thus while the higher level attributes are more enduring, those at the lower level are more malleable or fragile, and are continuously revised in light of experience.

Further, the assumptive world is sustained by cultural transmission and is influenced by class, ethnic, religious, regional, group or familial diversities. It is reconstructed continuously by the constant interaction of actors with the environment. In this respect the cases will consider cultural influences which can be identified as being particular to Scotland.

There can be no doubting that the analysis of values is a theoretical and methodological minefield. It is clear that different dimensions of belief and evaluation bear upon different policy areas, that problems arise in the identification of whose values are potent for policy and that decision outcomes often arise from the negotiation of conflicting value positions within the decision system. As Schoettle notes, 'a single policy conclusion may reflect a wide range of personal opinions and attitude structures among those who reach

it'.⁵¹ However, it is for this very reason Young argues that, 'the tangled skein of "values" must be unravelled if we are to understand better what government does'.⁵² The case studies will consider this point.

How we are to unravel them is not without its difficulties since there are empirical research problems in examining the assumptive world. These will be discussed later in Chapter 4 (Methodology). Yet like the concept of non-decision making, the concept of the assumptive world is an important factor to take into consideration in attempting to understand the policy process. Examining agenda management and the setting of priorities must involve examining the values and beliefs of those doing the setting (and those influencing the setting). So an understanding of the values of political actors, as both Frey and Jenkins suggest, is an important concomitant to understanding non-decision making, for as Lukes argues the predominance of certain values can prevent the emergence of conflict. To understand fully the case studies it will be necessary to 'stand back and probe in greater depth the world taken for granted'.

VII. Implications for the Case Studies

The underlying theme of this chapter has been that there is no one best way to view the policy process and that there is a need to link a number of different perspectives. By combining various approaches to policy analysis it becomes possible to identify the balance of forces which prevail in different phases and different types of policy. Since what you see depends on where you are and which way you are looking, a combination of approaches can provide the means by which to disaggregate and explore some of the component parts of the 'Scottish political system' as they manifest themselves

in our case studies.

It was noted in Chapter 1 that although Scotland has the administrative capacity to initiate distinctive policies the achievement in terms of substantive policy appears to be modest. Our case studies will examine to what extent this is true of 'issues of conscience'. While perhaps not wholly typical of independent Scottish policy formulation, the cases, because they reputedly fall within the 'Scottish political system', nevertheless offer a means to explore, as compared with the rest of Britain, what, if any, variations exist in the substantive policy areas under consideration and in the political and administrative processes by which those policies came to be formulated. Hence, the case studies will address themselves to such questions as:- What constitutes the 'Scottish dimension' in these particular moral issues? In what way, if any, does Scottish legislation in this sphere vary from that which prevails in England and for what reasons? What organisations and actors were involved in the policy areas in question? How did they reach their decisions on these issues and how were their representations made? What was 'public opinion' (in its widest sense) in each of the cases, against what criteria was it evaluated and what influence did it have in policy formulation? How did MPs form their opinions and in what way did they exert influence over policy? What was the role of the Scottish Office in these free vote issues? Is this type of policy, concerning issues of conscience and morality, contained wholly within the 'Scottish political system'? How did the legislative process for the issues in question actually operate? Is there any evidence to suggest inadequacies in procedure? If so, is there scope for improvement in Parliament's handling of Scottish affairs?

Each of the measures under consideration gave rise to divisions in which MPs were free to vote according to individual conscience rather than by party whip, hence they provide an interesting insight into the social and moral attitudes which prevail in Scottish politics. The cases will examine political actors' definitions of the issues in question and assess their perceptions of the scope and need for action. A consideration of actors' motivations can help in explaining not only action but also non-action. Here we need to examine the individual response in relation to peer groups and institutions because we are interested not only with actors as individuals but also with how their reality is constructed by the environment in which they operate. This leads us to consider the processes by which ideas, beliefs and definitions of situations are constructed within and by organisations.

Further, the origins and history of a particular policy can be a crucial factor in shaping attitudes since expectations of what policy will be about and its likely effects may derive from past debate, experiences and practices. So the history and political sentiments generated by that history can produce stances and attitudes towards policy issues that may not be directly related to the specific policy being promulgated, but nonetheless have an important effect on reactions and responses to the policy itself. The point is that attitudes and values are not necessarily generated by a specific policy but are more deeply ingrained by virtue of the subject matter itself, the polarization of views surrounding the subject and the antecedents of the policy currently under debate. Thus, how do actors shift their definitions of the situation? How does the time-scale of attitudinal change fit with political time-scales? And how far are institutional responses to change to do with personal or organisational

insecurity or uncertainty rather than purposive resistance?

It is then, to these questions and the others enunciated in this section that the empirical case material will address itself in Chapters 5 to 9. Before that, however, we will consider in the next chapter some aspects of the relationship between morality and the law and review some instances of Parliament's handling of such 'issues of conscience'.

1. see Gilbert Smith and David May, 'The Artificial Debate Between Rationalist and Incrementalist Models of Decision-Making', *Policy and Politics* 8, 1980, pp. 147-161.
2. Richard Simeon, 'Studying Public Policy', *Canadian Journal of Political Science* 9, 1976, pp. 548-80.
3. see Michael Carley, *Rational Techniques in Policy Analysis*, London, Heinemann, 1980.
4. *ibid.*, p. 33.
5. Smith and May, *op. cit.*, p. 149.
6. David Braybrooke and Charles E. Lindblom, 'A Strategy of Decision', New York, Free Press, 1963, p. 93;
see also C. E. Lindblom, 'The Science of "Muddling Through"', *Public Administration Review* 19, 1959, pp. 79-88.
7. Braybrooke and Lindblom, *op. cit.*, p. 105.
8. see Y. Dror, *Public Policy Making Re-examined*, New York, Chandler, 1968; also 'Muddling Through - "Science" or Inertia?', *Public Administration Review* 24, 1964, pp. 153-7;
A. Etzioni, *The Active Society*, New York, Free Press, 1968, Chs. 11 and 12; also 'Mixed Scanning - A Third Approach to Decision-Making', *Public Administration Review* 27, 1967, pp. 385-92.
9. *ibid.*, p. 154.
10. J. J. Richardson and A. G. Jordan, *Governing Under Pressure: The Policy Process in a Post-Parliamentary Democracy*, Oxford, Martin Robertson, 1979, p. 18.
11. Smith and May, *op. cit.*, p. 156.
12. Ian Gordon, Janet Lewis and Ken Young, 'Perspectives on Policy Analysis', *Public Administration Bulletin* 25, 1977, pp. 26-35, at p. 29.
13. Smith and May, *op. cit.*, p. 156.
14. Simeon, *op. cit.*, p. 555.
15. Keith Banting, *Poverty, Politics and Policy : Britain in the 1960s*, London, MacMillan, 1979, p. 10.
16. L. J. F. Smith, 'The Abortion Law Controversy 1936-1977: A Case Study in the "Emergence of Law"', Ph.D. Thesis, University of Edinburgh, 1979.
17. W. I. Jenkins, *Policy Analysis : A Political and Organisational Perspective*, London, Martin Robertson, 1978, p. 20.

18. J. E. Anderson, *Public Policy Making*, Nelson, 1975, p. 25,
cited in Jenkins *op. cit.*, p. 20.
19. Simeon, *op. cit.*, p. 555.
20. David Easton, *A Framework for Political Analysis*, New Jersey,
Prentice-Hall, 1965.
21. Jenkins, *op. cit.*, p. 22.
22. *ibid*, p. 63.
23. Chris Ham, 'Approaches to the Study of Social Policy Making',
Policy and Politics 8, 1980, pp. 55-71 at p. 61.
24. P. Hall, H. Land, R. Parker and A. Webb, *Change, Choice and
Conflict in Social Policy*; London, Heinemann, 1975, p. 34.
25. Richardson and Jordan, *op. cit.*, p. 25.
26. *ibid.*, p. 29.
27. *ibid.*, p. 74.
28. *ibid.*, p. 99.
29. Hall et al., *op. cit.*, p. 36.
30. *ibid.*, p. 37.
31. Jenkins, *op. cit.*, p. 64.
32. See also R. D. Putnam, *The Beliefs of Politicians: Ideology,
Conflict and Democracy in Britain and Italy*, Yale University
Press, New Haven, 1973; also 'Studying Elite Political
Culture: The Case of Ideology', *American Political Science
Review*, 65, 1971, pp. 651-81; and 'The Political Attitudes
of Senior Civil Servants in Western Europe', *British Journal
of Political Science*, 3, 1973, pp. 257-90.
33. Hall et al., *op. cit.*, p. 77.
34. E. E. Schattschneider, *The Semi-Sovereign People*, New York, Holt,
1960, p. 71.
35. see P. Bachrach and M. S. Baratz, 'Two Faces of Power', *American
Political Science Review*, 56, 1962, pp. 947-52; also
'Decisions and Non-Decisions : An Analytic Framework',
American Political Science Review 57, 1963, pp. 632-42;
and *Power and Poverty: Theory and Practice*, New York, OUP,
1970.
36. Bachrach and Baratz, *APSR* 1962, p. 948.
37. Mathew Crenson, *The Un-Politics of Air Pollution*, Baltimore,
John Hopkins, 1971.

38. J. K. Stringer and J. J. Richardson, 'Managing the Political Agenda : Problem Definition and Policy Making in Britain', *Parliamentary Affairs* 33, 1980.
39. *ibid.*, p. 27.
40. see R. M. Merleman, 'On the Elitist Critique of Community Power', *American Political Science Review* 62, 1968, pp. 451-60; R. E. Wolfinger, 'Non-Decisions and the Study of Local Politics', *American Political Science Review*, 65, 1971, pp. 1063-80; and G. Debnam, 'Non-Decisions and Power: The Two Faces of Bachrach and Baratz', *American Political Science Review* 69, 1975, pp. 889-99; see also F. W. Frey, 'Comment: On Issues and Non-issues in the Study of Power', *American Political Science Review*, 65, 1971, pp. 1081-1101.
41. Wolfinger, *op. cit.*, p. 1077.
42. Debnam, *op. cit.*, p. 895.
43. P. Bachrach and M. S. Baratz, 'Power and its Two Faces Revisited: A Reply to Geoffrey Debnam', *American Political Science Review* 69, 1975, pp. 900-4 at p. 901.
44. S. Lukes, *Power : A Radical View*, London, Macmillan, 1974.
45. Jenkins, *op. cit.*, p. 115.
46. *ibid.*, p. 115.
47. *ibid.*, p. 116.
48. S. H. Rakoff and G. F. Schaefer, 'Politics, Policy and Political Science: Theoretical Alternatives', *Politics and Society*, 1, 1970-71, pp. 51-77 at p. 66.
49. J. Carrier and I. Kendall, 'Social Policy and Social Change', *Journal of Social Policy* 2, 1973, pp. 209-24 and 'The Development of Welfare States : The Production of Plausible Accounts', *Journal of Social Policy*, 6, 1977, pp. 271-90.
50. Ken Young, 'Values in the Policy Process', *Policy and Politics* 5, 3, 1977, pp. 1-22; and Ken Young and Liz Mills, 'Understanding the Assumptive Worlds of Governmental Actors', SSRC Paper, 1978; see also Enid Curtis Bok Schoettle, 'The State of the Art in Policy Studies', R. A. Bauer and K. J. Gergen (eds.), *The Study of Policy Formation*, New York, Free Press, 1968.
51. Schoettle, *op. cit.*, p. 153.
52. Young, *op. cit.*, 1977, p. 1.

CHAPTER 3

Morality, Law and Policy-Making in Parliament

I. Introduction

Before proceeding to examine our Scottish case studies concerning 'issues of conscience' against the background outlined in Chapters 1 and 2, we need to consider more fully how moral issues stand in relation to the law. The aim of this chapter, therefore, is to explore some of the philosophical and practical considerations in legislating on moral questions.

Section II considers what types of activities and behaviour are appropriate for legal restriction. The problem revolves around making a sufficiently clear distinction between self-regarding and other regarding action, that is, between matters of private morality with which the criminal law ought to have no direct concern and matters of public order, decency and harm to others with which the criminal law can quite properly be concerned. In the late 1950s and the 1960s this issue of the regulation of moral conduct was fiercely debated by Lord Devlin and Professor H. L. A. Hart. The crux of Devlin's position was that the state had a duty to uphold moral standards because these were essential for the preservation of society itself. Hart, on the other hand, contended that Devlin's critique was merely a disguised defence of the conventional moral order. He suggested that not every act which contravened accepted morality was necessarily of equal importance in damaging society. Moral feeling must be assessed by more than a show of hands, he argued. It has to be subjected to critical appraisal as well. Other significant contributions to this debate, for example, from Dworkin, Richards and Wasserstrom will also be noted before the philosophical abstractions are left to consider some examples of moral issues which have involved legislation.

Section III examines some existing case studies on issues of morality and the law. These are considered not only in terms of the philosophical debate, but also in terms of the preceding chapters where approaches to policy making and Scottish culture were discussed. The cases of abortion, pornography, capital punishment and smoking are reviewed in some detail. The issue of smoking, while not strictly a moral matter, has been included because of a number of intriguing similarities it has to the case of liquor licensing in Scotland. Points of comparison and contrast between these studies and our own are raised periodically.

Section IV focuses on the more general role of Parliament in policy-making, the intention being to examine Parliament's seemingly limited role in the development of government policy relating to party political issues, and to compare this with its more prominent role when 'issues of conscience' are at stake. The conclusion is reached that for the most part Parliament's typical role is restricted, the bulk of policies appearing before Parliament as 'fait accomplis', having been formulated by the Executive, its bureaucracy and inner elites. Only when a broader societal consensus is required does Parliament begin to be able to influence the shape of policy.

Section V in drawing the themes of the chapter to a close, acknowledges that even when Parliament does make its mark on policy, it is more often than not a mark which has already been sanctioned by the government of the day. However, an alternative point of view is then postulated which suggests that Parliament has had a much greater influence in the 1970s than had hitherto been imagined. These different analyses are offered as alternatives against which our case studies might eventually be judged.

II. The Philosophical Debate

Laws exist to protect people and society, most obviously from physical harm, but also from psychic and emotional abuse. They function to safeguard individual and societal rights and liberties. But the law has two sides. By ensuring liberty to one set of persons, the law may restrict the liberty of others. A law by its very function places a limit on what was formerly a free exercise or action. The acceptability of such limitation depends upon its justifiability. When adequate justification is not forthcoming, most commonly by reference to majority opinion, then the law runs the risk of becoming oppressive. This is especially the case when the law impinges upon issues of morality. So which sorts of activities and which types of behaviour are appropriate for legal restriction? In what instances does insurance of the rights of individuals require that restrictions be placed on the freedom of others? Should the law be designed as a safeguard, and if so to what extent, against the destruction of a society's cherished moral beliefs? The question, then, is whether in a pluralistic society the fact that certain conduct is thought to be immoral by the majority is sufficient justification for limiting freedom by making such behaviour illegal.

Although many moral philosophers have been concerned with questions about the legal enforcement of morals, John Stuart Mill's essay 'On Liberty' (1859) has occupied and continues to occupy an especially prominent position. Mill inquired into the nature and limits of social control over the individual. The following passage is Mill's own summary of his central thesis:

'The object of this Essay is to assert one very simple principle ... That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the

only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute'.¹

Unfortunately this distinction between self-regarding action and other-regarding action produces acute difficulties of interpretation. For instance, if someone wishes of his own accord to take a habit-forming drug such as heroin, should he be stopped? On the one hand it might be argued that any attempt to deter such behaviour is tantamount to an impertinent interference with the individual for which no adequate justification can be produced. On the other it may be said that the state has a paternalist function which provides justification for preventing people from harming themselves and also from becoming a burden on the state welfare services and, therefore, on the whole community. This would make drug-taking other-regarding action and so liable to social control, although in Mill's day this conclusion would be less certain since modern welfare provision had not been developed.

Few actions then, can be regarded as wholly self-regarding and the dividing line is always open to argument. To take an example from our case studies: should people in Scotland be prohibited from going to a public house on Sunday because other people find such behaviour offensive and feel that the values they uphold will be harmed if such behaviour is permitted? For the strict Sabbatarian, the more recreation is allowed on a Sunday, the more society offends against his

principles. Can this degree of harm justify interference with the liberty of those who wish to go to a pub on Sunday? If so, cannot the potential pub-goer claim he is harmed by the organization of religious services which tend to breed such intolerance of mind as to lead to objections to Sunday pubs?

In each particular case a calculation of various factors is required: how far other people are adversely affected; whether the behaviour concerned is in public; whether the harm done to others is a matter of fact or opinion; whether the danger is to adults who can appreciate the risks, or to children who may not. In assessing the final balance weight has to be given to the value of individual freedom: to justify interference with personal liberty it must be shown that the harm resulting from freedom is greater than the harm coming from restrictions. In this way a type of cost-benefit analysis is required based as far as possible on objective evaluation of the consequences of alternative forms of action. However, such measurements are difficult to make and on which side the balance falls is a matter which everyone must decide for himself.

In the late fifties an intense philosophical debate arose between Lord Devlin and Professor H. L. A. Hart over the regulation of certain areas of moral conduct. This was stimulated by the publication of the Wolfenden Report on homosexuality and prostitution in 1957. As we shall see in Chapter 9 it recommended that homosexual behaviour occurring in private no longer be punishable under the law, and that there be no change in the existing law under which acts of prostitution were not in themselves illegal. The Committee's recommendations at several points read as if they were an application of Mill's general political-social theory. These recommendations were based upon a distinction between matters of private morality with which the criminal

law ought to have no direct concern and matters of public order, decency and harm to others with which the criminal law could quite properly be concerned. The function of the criminal law according to the Committee was 'to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others'.² It should not be considered the purpose of the law to intervene in the private lives of citizens, or to seek to enforce any pattern of behaviour unless the purposes of the law outlined above were shown relevant.

The crux of Lord Devlin's position is that the state has a duty to uphold moral standards because these are essential to the maintenance of society. In a modern society there are a variety of moral principles which some men adopt for their own guidance and do not attempt to impose upon others, for example the dictates of a particular religion. There are also moral standards which the majority places beyond toleration and imposes upon those who dissent. In our society the practice of monogamy is an example of this type. Lord Devlin's argument is that a society cannot survive unless some standards are of the latter class, because some moral conformity is essential to its existence.

'(S)ociety is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price'.³

Thus, society has a right to preserve its own existence, and therefore, the right to insist on some such conformity.

Now if society has such a right, then it has the right to use the institutions and sanctions of its criminal law to enforce the

right. Lord Devlin's argument continues:

'(I)f society has the right to make a judgement and has it on the basis that a recognized morality is as necessary to society as, say, a recognized government, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence'.⁴

So in the same way as society may use its law to protect itself against treason and sedition from within, it may use it to prevent a corruption of that conformity which ties it together.

The third strand of Lord Devlin's argument concerns the circumstances in which the state should exercise this power. How is the law-maker to ascertain the moral judgments of society? For Lord Devlin it is the opinion of the 'reasonable man'. The 'reasonable man' is not in fact expected to 'reason' about anything since his judgment may be largely a matter of 'feeling'.

'It is the viewpoint of the man in the street - or to use an archaism familiar to all lawyers - the man in the Clapham omnibus. He might also be called the right-minded man. For my purpose I should like to call him the man in the jury box, for the moral judgement of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous'.⁵

When such people are moved to 'intolerance, indignation and disgust' by particular conduct, then such conduct should be the subject of the criminal law. However, since the limits of tolerance can and do shift there can be no hard and fast rules as to when the state should intervene. Each particular case must be judged against the principles outlined. If privately conducted immoral conduct is judged by the standards of 'common sense' to be injurious to society by endangering the moral order necessary for its preservation, then society is justified, as a matter of principle, in legislating against that conduct.

Devlin's critique then, is both an attack on the specific recommendations of the Wolfenden Report and a more general comment on the philosophy of J. S. Mill. In this light it is Devlin's contention that homosexual behaviour and prostitution can be judged by the above standards to undermine the moral fabric of society and so each can properly be legislated against because the integrity and very existence of society is threatened if such laws do not exist.

H. L. A. Hart has been Devlin's leading critic as well as a selective defender of both Mill and the Wolfenden Report. He questions Devlin's view of the nature of morality:

'much that he writes reads like an abjuration of the notion that reasoning or thinking has much to do with morality'.⁶

Hart accepts that laws against murder, theft and much else would be of little use if they were not supported by a widely diffused conviction that what these laws forbid is also immoral. However, it does not follow that everything to which the moral vetoes of accepted morality attach is of equal importance to society. Nor is there any reason for thinking of morality as a 'seamless web' which will fall to pieces bringing down society unless all conduct involving moral considerations is enforced by law. Hart writes:

'(W)hy should we not summon all the resources of our reason, sympathetic understanding, as well as critical intelligence and insist that before general moral feeling is turned into criminal law it is submitted to a scrutiny of a different kind from Sir Patrick's? Surely, the legislator should ask whether the general morality is based on ignorance, superstition, or misunderstanding; whether there is a false conception that those who practise what it condemns are in other ways dangerous or hostile to society...'

He continues:

'(I)t is fatally easy to confuse the democratic principle that power should be in the hands of the majority with the utterly different claim that the majority, with power in their hands, need respect no limits'.⁷

Hart suggests then, that Devlin's contention is merely a disguised conservative defence of the conventional moral order.

Others too have made contributions to the continuing debate. Ronald Dworkin, for instance, has criticised Devlin's position on the grounds that what is wrong is not his idea that the community's morality counts, but his idea of what counts as the community's morality. He advocates that a conscientious legislator who is told a moral consensus exists must test the credentials of that consensus. The claim that a moral consensus exists cannot simply be based on a poll on the 'Clapham omnibus'. Certainly it is based on an appeal to the legislator's sense of how his community reacts to some disfavoured practice but this must include an awareness of the grounds on which that reaction is generally supported. Dworkin argues:

'If there has been a public debate involving the editorial columns, speeches of his colleagues, the testimony of interested groups, and his own correspondence, these will sharpen his awareness of what arguments and positions are in the field. He must sift these arguments and positions, trying to determine which are prejudices or rationalizations, which presuppose general principles or theories vast parts of the population could not be supposed to accept, and so on. It may be that when he has finished this process of reflection he will find that the claim of a moral consensus has not been made out.'⁸

Of course, if a legislator shares the popular views he is less likely to find them wanting, though if he is self-critical the exercise may convert him. His answer, in any event, will depend upon his own understanding of what morality involves. This, emphasises Dworkin, should not be misconstrued as 'moral elitism'. The legislator is not rejecting the views of the public, merely placing them under scrutiny.

Peter Richards has also reacted against Devlin's argument. He considers Devlin's position as being 'basically anti-intellectual',

but he does see how 'it can be defended as a sensible, no-nonsense system for the running of a successful, stable society'.⁹ It is this quality, he suggests, which appeals to many Ministers, senior civil servants and police officers, as well as to a number of MPs. As we shall see in our cases many of those in power and influence staunchly defend Devlin's 'disintegration thesis'. On the issue of homosexuality a number of MPs were to be found arguing that toleration of such practices would lead to a moral decay which would shake society to its foundations.

Richard Wasserstrom has made an interesting and important point concerning the controversy. Since the Wolfenden Report provoked the initial debate its focal point has tended to be the regulation of sexual behaviour by the criminal law - with the paradigmatic case being private, consensual homosexual acts between adults. Thus, the fundamental issue was often described as whether the immorality of an action could alone be a sufficient ground for making that action illegal, and the problem was described as concerning the appropriateness of the enforcement of morality, or of morals, by the law.

Wasserstrom has pointed out that this emphasis upon the regulation of sexual behaviour by the law constitutes a narrowing of the scope of Mill's enquiry and he suggests that problems of sexual morality may be different in important respects from problems of morality generally. He poses the question:

'are problems of sexual morality (and the corresponding predicates) simply problems of morality as applied to sexual relationships, or are problems of sexual morality *sui generis* because, for example, sexual morality is a very special, and in many ways unique, area of human concern?'¹⁰

If problems of sexual morality are to any appreciable degree *sui generis*, then contemporary issues such as homosexuality and prostitution

may have distorted the more general discussion of the enforcement of morality by the law. The considerations most relevant to a rational discussion of the enforcement of sexual morality by the law may not, in fact, be the considerations most significant to the enforcement of non-sexual morality by the law. If this is the case, then Wasserstrom observes that the emphasis on sexual morality in contemporary discussions has to be taken into account and different paradigms for the enforcement of morality have to be found and considered.

At this stage let us move away from the abstract philosophical debate to consider some examples of moral issues which have involved legislation. The remainder of the chapter will examine these issues not only in terms of the above debate, but also in terms of the preceding chapters where approaches to policy-making and Scottish culture were discussed. The review will be looking to identify points of comparison and contrast with our own case studies on moral issues in Scotland.

III. Case Studies in Morality and the Law

a) Abortion

The fundamental issue in the abortion controversy concerns the 'sanctity of human life'.¹¹ In what circumstances, if any, can the act of aborting a human foetus be justified? Adequate criteria are difficult to devise because it remains unclear precisely what counts as human life and what, if anything, counts as an exceptional circumstance allowing forms of life to be destroyed. Two central issues therefore arise in the discussion of the ethical justifiability of abortion: I) the moral status of the unborn, and II) the question of moral priorities in abortion. Positions taken on the first question have a direct bearing on positions pertaining to the second. Four

points of view can be identified although many further gradations exist between them.

The first position maintains that human life is the direct result of fertilization of a human ovum by human sperm. From this moment there is a process of maturation in which the foetus is regarded as a human lacking only certain functional capacities. The foetus, in this theory, is fully, not merely potentially, a human life. Its intentional destruction is therefore immoral. Roman Catholics have traditionally expounded this theory, although they are by no means its only advocates.

A second position maintains that the foetus has a special status but that it is not a human being until some point later in pregnancy, rather than at conception. For this reason it is held that abortions after a specifiable stage of development are destructions of human life and are morally permissible only if some paramount evil such as the death of the mother is to be averted.

The third view partially agrees with this latter position in that it takes the foetus to have a special status which precludes the mother from adopting any treatment she wishes. But exponents of this view also maintain that removal of the foetus is not at any specific stage tantamount to a destruction of human life and that many reasons for abortion override objections to it. For example cases of rape, possible death of the mother, and drug-deformed foetuses are considered by advocates of this position to be sufficiently serious to outweigh other arguments against abortion. This stance has been favoured by civil libertarians.

The final position holds that a foetus does not have an ethically significant, special status, but is merely something a person possesses in the body. Consequently, when the foetus is unwanted, the woman

has a right to remove it. In this view an abortion is no more reprehensible than say, an appendectomy. This position is commonly promulgated by advocates of women's liberation who emphasise the right of a woman to her own body.

These are the parameters in which the abortion debate has taken place. The fundamental problem has been to draw a non-arbitrary line between human and non-human existence, in the hope that a non-arbitrary line can be drawn between the rights of the mother and the at least postulated rights of the foetus.

Peter Richards has traced the history of the abortion issue from the time of early Rome where it was approved, through the development of Christian condemnation of the practice to Victorian ambivalence and uncertainty. As a result of this ambivalent history the law in the first half of the twentieth century was confused.¹² Dissatisfaction with the operation of the law and a demand for reform began to emerge in the late fifties and early sixties. The climate of opinion became more liberal and 'the idea that easier abortion would lead to moral decay and sexual licence lost much of its power'.¹³ Reformers pointed to the inadequacy of the law arguing that the medical profession were doubtful about what the law permitted, that there was one law for the rich and another for the poor, and that the rate of legitimate therapeutic abortions varied between different regions of the country. A formal restatement of the law was urged on the basis that it would help to even out these inequalities in its application to various income groups and in different areas.

The parliamentary campaign for reform began in the mid-sixties. The ground was prepared with the introduction of three Private Member's Bills in quick succession - by Mrs. Renee Short under the Ten-Minute Rule in June, 1965; by Lord Silkin in the Upper House in November,

1965; and by Wingfield Digby under the ballot procedure in February, 1966. After the 1966 General Election, David Steel won third place in the ballot, and on being approached by the Abortion Law Reform Association (ALRA), decided to promote their cause.

Steel's Bill was similar to earlier measures. Its original draft provided for therapeutic and eugenic terminations and the social clause - later rephrased - permitted abortion where a woman's capacity as a mother would be severely overstrained. It had a rape clause, but this was omitted during the committee stage. Concurrence of two registered medical practitioners was required except where an emergency operation was necessary to save a woman's life. All terminations were to be carried out in a NHS hospital or other place approved by the Minister of Health, and those not done in hospital were to be notified.

The Bill passed its second reading by 223 votes to 29, but its committee stage was protracted with twelve sittings. It did not appear before the House for the report stage until June 1967, when one whole Friday of private member's time proved utterly inadequate to deal with the amendments tabled. However, as was the way of this particular Labour administration, further time was allocated at the close of Government business on two subsequent occasions so that the Bill might complete its passage.

Richards identified the Abortion Law Reform Association as the principal driving force behind the campaign. Their case was pressed at public and private meetings, and MPs were lobbied in person and by correspondence.¹⁴ They were a young, middle-class, intellectual group whose strength came from the quality of their support rather than from its size or financial power.¹⁵ In many respects it was similar to the Divorce Law Reform Union which was so active on English Divorce Reform.

This is in stark contrast to divorce reform in Scotland where there was no such single purpose pressure group. Only the Scottish Minorities Group in pressing for homosexual law reform in Scotland can perhaps compare favourably, although even here the effectiveness of the SMG was diminished because of its internal divisions.

In opposition to ALRA was the Society for the Protection of the Unborn Child (SPUC). This was founded in January 1967 specifically to oppose Steel's Bill, but, according to Richards, its policy was unclear and its general tactic was to urge the need for further consideration and the appointment of a Royal Commission. It was very late into the fray and consequently lacked the political skill of ALRA. However, Colin Francome has suggested that one of the reasons why the abortion issue has not disappeared from the political agenda (the most recent attempt at limiting the availability of abortion being John Corrie's Private Member's Bill of 1980) is that SPUC has increased its efforts, learned pressure group politics, and established throughout the country a sound basis in the Catholic Church, while ALRA has tended to wind down its organisation and to concentrate its resources on other issues such as birth control.¹⁶ He observes that 'since the 1960s the liberalisation of sexual attitudes has slowed somewhat and with the growth of such movements as the Festival of Light there has been an attempt at a backlash.'¹⁷

Richards has noted that while many bodies expressed opinions on abortion law reform, their attitudes were not easy to categorise because those which favoured change wanted particular types of change. Thus acceptance for the need for reform by no means produced agreement on the precise wording of the Bill. This same broad range of opinion is to be found in all three of our own case studies and is perhaps a feature of moral legislation, where, often literally, every man has his own opinion.

Another feature which compares with our own cases concerns the attitude of the medical profession. Richards' account indicates that the views of the British Medical Association and the Royal College of Obstetricians and Gynaecologists 'were not completely identical'. This same variation in medical opinion is to be found in the case on licensing reform, where the various medical bodies - the BMA, the Royal Colleges of Edinburgh and Glasgow, the Institute of Psychiatrists - could not agree on the likely effect of licensing laws on the misuse of alcohol. Lack of evidence, they said, prevented them from reaching any firm conclusions.

In terms of pressure group politics the abortion issue demonstrates the importance of having a well organised, single purpose group, familiar with parliamentary procedure and lobbying techniques, to promote the issue and influence MPs. 'ALRA, by winning acceptance for its own draft Bill, established the terms on which other groups had to fight', observes Bridget Pym.¹⁸ The issue also illustrates the limited influence which a group may yield if it only enters the political fray at a late stage after an important vote has been taken. MPs are usually reluctant to alter their positions once they have made them public. Pym remarks that the SPUC were 'largely unsuccessful except in so far as their intervention frustrated further liberalism'.¹⁹ We shall see instances of late lobbying in our case study on licensing.

In the same way as the English divorce and homosexuality provisions, abortion was accorded government time in parliament. The success of all three reforms was undoubtedly due in great measure to the benevolence of sympathetic Labour Ministers. This was to provide one of the most obvious contrasts with the reform of Scottish law in divorce and homosexuality, where the question of adequate parliamentary time for debate was one of the central issues.

b) Pornography

O. R. McGregor has noted that the fifties and sixties 'witnessed the cumulative removal of restraints both of custom and law upon certain forms of sexual satisfaction and behaviour and upon their public portrayal in print or in the visual arts or for commercial purposes'.²⁰ For many, these developments constituted the emergence of 'the permissive society' and produced in them the considerable anxiety that greater freedom of expression was causing a dangerous decline in moral standards. Consequently, the very early seventies, with the initiation of such movements as the Festival of Light, saw something of a backlash against the increasingly liberal attitudes towards sex and especially its portrayal in public: things were deemed to have 'gone too far'.

In this respect pornography and obscenity are slightly different from the other moral issues of that period since the question was not that the law was too restrictive but that it allowed too much freedom. The limits of the law were continually being redefined as increasingly explicit stage productions, films and publications were produced. The stage production 'Oh! Calcutta!', the film 'Beyond the Valley of the Dolls', and the publication 'Schoolkids' OZ', all caused a public outcry. Anti-pornography groups such as the National Viewers' and Listeners' Association demanded revision of the legal criteria concerning obscenity to halt the downward spiral into moral decay.

The debate was set very much in the mould of the Devlin/Hart controversy over the enforcement of morals - to what extent should the obscenity laws encroach upon an individual's freedom to consume sexually explicit material? David Holbrook has identified one of the fundamental problems involved - 'the paradox ... is that liberal tolerance is always faced with the problem of tolerating developments which threaten those values in which tolerance is grounded'.²¹

During the course of the last decade there have been two major reports on pornography and obscenity - the Longford Report in the early seventies and the Williams Report in the late seventies.²²

The Longford Committee was an independent inquiry set up by Lord Longford to investigate pornography and 'to see what means of tackling the problem of Pornography would command general support'.

Its report outlined the growth of public concern, examined the different facets of the highly profitable pornography trade, illustrated the preponderance of violence in much pornographic material, and reviewed the various outlets through which pornographic products could be made available to the public - broadcasting, cinema and theatre, and books, magazines and newspapers. On the role of law in questions of morality the Report stated:

'... it is manifestly impossible to protect some members of society without any restriction whatever on the unfettered liberty of others, which means, in this context, that the law must forbid any exploitation of the young or any unnecessary offence to those considerable number of citizens who object to having pornographic material thrust under their noses. And this, in turn leads to the conclusion that there should be legislation prohibiting any form of public display of pornographic material, any unsolicited distribution of it by post, and also any purveyance of it, in any way, to those under some specified age'.²⁴

The Report made a number of recommendations along these lines and outlined a draft Bill as a basis for legislative reform in England and Wales of the Obscene Publication Acts.

The legal position in Scotland relating to obscenity was based on Common Law and on a variety of statutory provisions. In a separate chapter devoted to Scotland the Report was pleased to note that, generally speaking, the spread of pornography had not been so great in Scotland as in other parts of the U.K. While in some aspects it had

been almost identical (e.g. in broadcasting, films, newspapers and magazines which were available nationally), in areas such as the theatre liberalisation had not gone to the same extremes as in London. Nor were sex shops widespread due to public protest.

Here we can see an example of the duality in Scottish culture - on the one hand being influenced by the values of the metropolitan South, while on the other exercising an element of Scottish 'restraint'.

The Report was moved to comment:

'It is our firm view that the cultural heritage of the Scot is strongly moralistic and that there is benefit to a nation from a standard of morality. Anything which tarnishes or destroys that common standard or which would diminish or denigrate the personality of the constituent member of society is not to be encouraged'.²⁵

At the end of the decade the Williams Report appeared. This was an official inquiry set up by the Home Secretary into obscenity and film censorship in England and Wales. Its recommendations were not dissimilar to Longford's. It proposed that the existing obscenity laws be scrapped and a comprehensive new statute should start afresh. The law should be recast to take into account both the harms caused by the existence of certain material (since these alone could justify prohibition) and the public's legitimate interest in not being offended by the display and availability of the material. The latter could justify no more than the imposition of restrictions designed to protect the ordinary citizen from unreasonable offence. Thus the principal object of the law should be to prevent certain kinds of material being made available to young people or causing offence to reasonable people.

The philosophical issue of the law's relationship to morality again constituted the underlying theme of the Report. Chapter Five was devoted to an inquiry into the law, morality and freedom of

expression. The Report commented that freedom of expression had to be balanced against the possible harmful effects which could arise should such freedom be abused. Thus the 'harm condition' was accepted but it was noted that there were wide differences of opinion about the harms publications and films might cause, and also about what might count as a harm. The Williams Committee therefore had the difficult problem of establishing what the public thought about obscenity.

On this question of research into public opinion an interesting comparison can be made between the attitude of the Williams Committee and the attitude of the Clayson Committee on Scottish Licensing Law. Both Williams and Clayson shared a scepticism about the usefulness of the findings of survey polls. The results of several such polls were made available to the Williams Committee but they found it difficult to gain a clear idea from these of what people thought because 'contradictions and inconsistencies were evident in all of them'.

The Report stated:

'It seemed clear that even if questions were framed with considerable care, the answers could not be accepted at their face value. ... Questions about what people found to be indecent produced only confusing results and certainly were of no help to us in deciding what the law should attempt to restrict'.²⁶

This, as we shall see in a later chapter, is a remarkably similar conclusion to the one reached by Dr. Clayson concerning the findings of an OPCS poll on public attitudes to drinking and the licensing laws in Scotland.

Rudolf Klein observed in an article in 1974 that there appeared to be a new emphasis in the relationship between public policy and public opinion.²⁷ There was now much more stress on trying to establish the state of public opinion as a preliminary to making decisions

about policy. This concern with public opinion can, though, involve different estimates of its importance. On the one hand, there are those who take the view that only public opinion can give legitimacy to the acts of government, and on the other, there are those who see public opinion as just one of the factors which must be taken into account in the decision-making process, but which does not necessarily determine its outcome. For Klein, 'the relationship between public opinion and politics is a two-way one; the flow of influence certainly does not always - if ever - run neatly from the former to the latter'.²⁸

Klein illustrated this by referring to the state of public opinion on some reforms involving issues of morality. He pointed out that the abolition of hanging was a clear-cut case of Parliament, backed by elite opinion, ignoring the views of a majority of the country's inhabitants, some two-thirds of whom wanted at the time to keep the death penalty. In contrast, public opinion in England on the divorce and homosexuality issues appears to have been ahead of Parliament in its willingness to accept liberal reforms. For instance, Klein has recorded that a 1965 NOP poll found that 63% were prepared to support the Wolfenden Committee's recommendation that homosexual acts between consenting adults in private should no longer be a criminal offence. In our case studies on Scottish divorce and homosexuality we shall see that one of the reasons offered for legislative inactivity was that Scottish public opinion remained hostile to reform.

Klein's argument is that public opinion is 'an unreliable ally'. Generally, though not always, it tends to be conservative in its attitude towards change. Radical policies are thus the creation of elites. Consequently, this suggests the paradox that 'it is precisely those who want the greatest social changes who should be most elitist in their approach'. He explains:

'To stress unapologetically the role of elitism in public policy-making is not to dismiss public opinion. It is, however, to be realistic about the relationship between the two. It is to accept that an elitism which is neither paternalistic nor authoritarian has a peculiarly difficult part to play in today's circumstances - and one which requires it to explain, educate and debate on a scale far greater than contemplated hitherto'.²⁹

These questions concerning the nature of public opinion, the role of elites in policy formulation, and the role of Parliament in either leading or following popular opinion, feature prominently in our Scottish case studies.

This issue of pornography and obscenity offers another point of comparison with our case studies - that there exists separate legislation on the same subject either side of the Border. A recent Church of Scotland publication on obscenity complained that the existing piecemeal Scottish legislation had been allowed to atrophy. It commented that 'to have any law on the statute book which is either held in contempt or inefficient in its operation lowers respect for the whole body of the law'.³⁰ As the case study on homosexuality will illustrate this was one of the main arguments put forward in the seventies for a legislative reform of the law relating to homosexual conduct in Scotland. Retaining a statute which made homosexual acts in private between consenting adults an offence while pursuing a policy of 'no prosecutions' was deemed to be bringing the law into disrepute.

The Church of Scotland report further argued that there seemed no good reason why in this field of law there should be any difference in substance between England and Scotland in the offences involved. It noted that as the Williams Committee's inquiry was confined to England and Wales, any Bill brought before Parliament on the basis of its recommendations was likely to be similarly limited. As a result Scotland was faced with the possibility of a delay before any

measures were brought forward. The Church comments:

'There seems to us to be no reason why any improvements to the law in Scotland should await the end of this predictably long delay. It should in our view be possible to enact legislation applicable to Scotland alone now'.³¹

This sentiment was one that was frequently expressed during the debates on Scottish divorce reform throughout the first half of the 1970s. It was argued in some quarters that after the successful enactment of English divorce reform in 1969, Scotland suffered an unjustifiable 'delay' before it eventually achieved the corresponding reform. Questions came to be raised about Parliament's handling of Scottish business generally.

The subject of obscenity then, offers some interesting comparisons with our own case studies. Those questions outlined above, along with others, will be examined at length in the later chapters of the thesis.

c) Capital Punishment

Of all the social issues which involve questions of morality none has attracted more public attention than capital punishment. Although capital punishment is now abolished for all practical purposes, the debate continues to arise in Parliament as periodic attempts are made to reintroduce the death penalty, the most recent attempt on 11th May 1982 being defeated by 357 votes to 195. The subject has achieved a compelling fascination and, in consequence, lingers on in the public consciousness.

Morally, the issue is somewhat distinct because the regulation of conduct applies to the state rather than the individual. However, one is still able to ask the basic question - how far should the law reflect public mores? The issue gives rise to philosophical questions about the link between law and morals and about the nature of

parliamentary representation. As Gavin Drewry has observed, the interest in the subject over the years has stemmed 'not only from the macabre aura of fascination surrounding the death cell and the scaffold, but also from the opportunity it has given us to observe how our elected representatives behave when their constituents are known to have strong views and the whips are off'.³²

Punishment is generally held to have three principal purposes - retribution, deterrence and reformation. The relative importance of these three principles has been differently assessed at different periods and by different authorities. Capital punishment though, can have no reformative application, hence a defence of the death penalty has to rest on either the principle of retribution or the principle of deterrence or on some combination of the two. The case in favour of the death penalty usually revolves around the following types of argument - at least some forms of crime are deterred by the threat of death; society has a right to punish capital offences with similar sentences; some crimes deserve the death penalty; and capital punishment protects society by preventing recidivism in capital offenders. On the other hand the case against the death penalty emphasises that - capital punishment is a primitive form of retribution based on revenge; judicial mistakes can lead to the death of innocent persons; no evidence shows capital punishment to have a deterrent effect; and the right to life cannot legitimately be taken away from anyone.

Capital punishment laws have therefore usually been framed with the dual intent that they be both retributive and preventive. Correspondingly, the challenge to those laws has been based on the twin contentions that retribution is an outmoded principle upon which to found the criminal law and that the deterrence claim is largely unsubstantiated.

Parliamentary preoccupation with capital punishment dates back at least to the beginning of the 19th century to the campaign led by Sir Samuel Romilly to abolish hanging for minor offences against property. The modern debate, concerning the appropriateness of the death penalty as the punishment for murder, goes back to before the last war. In 1938 the Commons debated a motion to abolish the death penalty and this established the precedent that the issue was one to be decided without party whipping. After the war the compendious Criminal Justice Bill of 1948 carried a backbench abolition amendment which was eventually defeated in the House of Lords. 1949 saw the appointment of a Royal Commission under the chairmanship of Sir Ernest Gowers to examine the question of capital punishment. The Commission's terms of reference precluded a straightforward recommendation for or against the death penalty with the result that its report, published in 1953, contained a broad variety of conclusions and proposals.³³ Its publication though gave fresh impetus to the debate. Interest was further stimulated in the mid-fifties by the publicity surrounding a number of murder cases. Evidence suggested that certain of the accused had been wrongfully sentenced to death and hanged. This caused public concern about the administration of the existing law. The outcome was the Homicide Act of 1957 which made a distinction between capital and non-capital murder, i.e. only certain categories of murder were henceforth to carry the death penalty, the remainder carrying the sentence of life-imprisonment. This compromise was intended by the Conservative Government to take the steam of the growing parliamentary clamour for outright abolition.

For a while the issue subsided but there was little doubt that the law had been left in an unsatisfactory condition. Inevitably the anomalies inherent in the Homicide Act became a central feature

of the abolitionist case. In response to growing concern, Harold Wilson promised in 1964 parliamentary time for a free debate on the issue. Here Richards has pointed to something of a 'constitutional oddity' in that a Bill was mentioned in the Queen's Speech on which the Government did not express an opinion and which was subsequently introduced by a backbencher, Sydney Silverman. He remarks that 'there is no doubt that some of the procedural wrangles that developed over the Bill were due to its curious parentage'.³⁴ However, in spite of these wrangles Sydney Silverman's Bill - the Murder (Abolition of the Death Penalty) Bill - managed successfully to negotiate its way through Parliament to reach the statute book in the middle of 1965, although it did contain the proviso that the Act remain initially in force for five years and thereafter should apply only as a result of affirmative resolutions by both Houses of Parliament.

The debate on capital punishment in the post-war years was marked by a gradual shift of opinion in both Houses of Parliament in favour of abolition. However this trend was no reflection of popular feeling in the country at large. Richards' research shows that in June 1962 a Gallup Poll indicated that 19% supported the abolitionist cause; in July 1964 the figure had risen to 21% and in February 1965 to only 23%. Moreover in June 1966 76% thought that the death penalty should be re-introduced. He comments:

'Abolitionist Members could react to the unmistakable evidence of the balance of opinion only by the assertion that it was the task of Parliament to lead opinion, not merely to follow it. The Burke theory of representation always gives comfort, or excuse, to a Member hard-pressed by his constituents'.³⁵

Being an issue of 'conscience' MPs found themselves liberated from the usual party constraints and as a consequence Parliament was able to play an active part in the formulation of policy on capital

punishment. However, this was only possible because of the Government's decision to allocate parliamentary time to allow the issue to be debated and in this regard Drewry has noted that the Labour Government's 'pretence at neutrality was patently spurious'.

The issue of capital punishment perhaps does not offer as many obvious comparisons with our own case studies as some of the other issues of 'conscience'. But there are some. Witness again the importance of the allocation of time in Parliament. Note also how on some issues Parliament prefers to lead public opinion while on others it prefers to follow. And observe how MPs, free from the party whips, must balance their own opinions and consciences against constituency pressure and other influences.

d) Smoking

Strictly speaking smoking is not an issue of morality. In certain circumstances it may be considered anti-social or impolite to indulge, but few would go as far as to describe the practice as immoral. Yet it is another of those issues which involve questions concerning the freedom of the individual and his liberty of action. In what ways, if any, does society have a right to restrict an individual's freedom of choice to smoke? Once again the question of self-regarding and other-regarding action arises. Should smoking be controlled on paternalist grounds? Or is it sufficient to demonstrate that an individual's freedom of choice to smoke can impinge upon another individual's freedom of choice to live in a smoke-free atmosphere?

All the above questions can also be asked about drinking. In this respect the cases of smoking and drinking are remarkably similar. Not only do they raise similar philosophical questions about

individual freedom of choice, they also bring to the fore similar social and political questions concerning health policy, the raising of public revenue, and the power of vested interests. Here we shall examine a study by G. T. Popham about policy-making and pressure group activity on the smoking issue and highlight a number of the similarities that are to be found by comparing it with our study on the Scottish drink laws.³⁶

Popham contends that the social costs of smoking; e.g. premature deaths, still births attributable to smoking by pregnant women, the financial costs; e.g. lost production through illnesses associated with smoking; and the cost of treating smoking-related diseases, constitute powerful arguments in favour of curbing smoking. However, these have to be weighed against the revenue and employment provided by the tobacco industry. Groups such as FOREST (Freedom Organisation for the Right to Enjoy Smoking Tobacco) might also add that an individual's freedom of choice must enter the equation somewhere. Thus, there is an immediate parallel with drinking where similar heavy social and financial costs have to be balanced against the economics of the brewing and distilling industries, and where, somewhere in the middle, the rights of the ordinary citizen to 'enjoy a drink' have to be taken into consideration.

The vast disparity in financial resources between the health promotion organisations and the respective industries is also another common feature. Popham shows that ASH (Action on Smoking and Health), a group set up by the Royal College of Physicians in 1971 to keep the issue of smoking and health politically alive and to press for policies to discourage smoking, had in 1978-9 a total income of £80,000. This compares rather unfavourably with the tobacco industry which was spending £80 million on advertising in the mid-seventies. When set

against the brewers' and distillers' expenditure on product promotion, the Health Education Council's budget (£734,000 in Scotland in 1977-8) is likewise a drop in the ocean. As Popham remarks, 'tobacco firms know that the Treasury will not welcome policies which adversely affect their annual contributions in duty and that Governments cannot lightly ignore the value of their exports or the jobs they provide'.³⁷ This conclusion is equally applicable to the drink trade.

The advertising of products is also similar in style (although T.V. advertising of cigarettes is banned). The product, whether it be a drink or a brand of cigarette, is usually associated with a materially successful and sophisticated life-style involving virility and sexual conquest. Sponsorship of sport, with brand names subsidising particular events, is another way in which the product is linked to success.

As well as being concerned about their products' image both the tobacco industry and the drink industry are concerned about their own image. The tobacco industry can be found putting money into cancer research and into research on lower-risk cigarettes, while the brewers and distillers put money into medical research on alcoholism and alcohol related disabilities. It is felt that a demonstration of concern over the harmful effects of their products helps to soften the public's image of these industries as hard-hearted profit-making conglomerates.

Policy-making on both smoking and drinking has thus been the outcome of a process in which pressure groups have played a particularly important role because these issues are commonly regarded as being non-party political. From his research on the smoking issue Popham argues that conflict between the various pressure groups becomes a substitute for antagonism between rival political parties. While group resources are unevenly distributed in this conflict, and while the tobacco

industry has traditionally identified with the Tory party, lack of a party line has meant that 'pro- and anti-smoking groups have moved in to fill the policy vacuum and have encouraged cross party alignments'.³⁸ A similar pattern of pressure group activity and cross party alignments is to be found in our case study on the Scottish drink laws.

These then, are some of the more obvious comparisons between Popham's study and our own. In both instances a number of competing factors have to be balanced against each other. Thus, the issue of the law's encroachment on personal freedom must be balanced against health considerations which must themselves be balanced against economic interests which must in turn be balanced against prevailing social trends.

IV. Parliament and Policy Making

In Part iv of this chapter on morality, law and Parliament we shall turn our attention to the more general role of Parliament in policy-making. Whereas our previous examples of case studies illustrated aspects of the law's relationship to morality, the case studies selected in this section will be drawn from a much broader range of research into policy formulation. The intention here is to examine Parliament's seemingly limited role in the development of Government policy on party-political issues, and to compare this with its more prominent role when 'issues of conscience' are at stake. We will also be paying particular attention to the manner in which these case studies have been approached and presented in order to identify any similarities in style that might exist between these and our own studies.

There are some issues though, which fall rather uneasily between the categories of 'party' and 'non-party' political issues. These

somehow manage to invoke both ideological and moral considerations. One such issue is immigration. Here Hannan Rose has undertaken research into the Immigration Act 1971 as 'a case study in the work of Parliament'.³⁹

The starting point for Rose's study was the suggestion that much of the time of MPs was wasted on debates which had no influence upon policies that had already been decided. He felt though, that such criticism tended to be abstract and academic. Therefore, he approached the study of Parliament in a practical way by following the progress of a piece of legislation. This would allow the shortcomings of Parliament to be assessed by examining the way in which particular questions were handled. He recognised, however, that the subjects of immigration and race relations were particularly delicate ones in British politics, and that 'an example drawn from this area would not necessarily be representative of the legislative process as a whole'.⁴⁰

In stark contrast to the normative rational model of policy development, legislation on race relations in Britain can be characterised as a series of ad hoc Government responses to specific and immediate political controversies. Consequently, the aims of Rose's study were to examine whether there was a rational basis for Government policy so that action was taken to pursue 'solutions' to 'problems', whether Parliamentary debate enabled alternative views of what constituted the problem to be aired, and whether in dealing with the Government's proposed legislation, that debate was effective in refining and improving the draft law.⁴¹

The 1970 General Election saw the Conservative Party adopt a 'tough' policy on immigration and upon taking office this commitment was fulfilled by the Immigration Act 1971. However, Rose has commented that it was not at all clear how the promise to the electorate

came to be translated into Parliamentary legislation. The confusion lay in the fact that the Conservative Party had been concerned to meet a difficult political situation which demanded a policy to 'limit immigration' whether or not there was a real problem to be solved. Thus, the Government had promised to remove any threat of 'further large-scale permanent immigration', but it appeared unable to make clear what the policy would be or what considerations might be behind it. This says Rose, 'created an impression that there was no policy which had been thought out'.⁴²

When the 1971 Bill reached Committee, party discipline played a major part in resolving disputes with both parties retaining rigid control over divisions. 'Voting strength rather than the importance of contributions from the members of the Committee to its debates was the important consideration', observed Rose.⁴³ This, of course, was achieved by careful selection of the Committee's Conservative membership by the Government Whips, since not all Conservatives agreed with the Bill's provisions.

Research by Valentine Herman has illustrated the limited effect of Opposition and backbench amendments moved in Committee and on Report on Government legislation.⁴⁴ Analysing 768 amendments to 45 Bills in the 1968-9 session he found that most amendments were of a minor and textual nature, the Government tidying up its own errors and omissions; that only 5% of Opposition amendments succeeded, these also being of a minor and technical nature; and that not a single important amendment was accepted. He does not, however, paint a totally negative picture of the Parliamentary process, pointing out that successful Government amendments were often based on previous Opposition points or those of Government backbenchers; that many amendments were not intended to be incorporated into legislation but rather

to probe the Government's intentions or the meaning of legal phrasing; and that Committees did point out flaws, anomalies and ambiguities which the Government then corrected.

Rose is much more optimistic about the value of the procedure in the Upper House where 'a combination of informed debate and less rigid Party discipline had a marked effect on the outcome'⁴⁵ of the Immigration Bill. He noted that the Lords did not have the same distractions as MPs as far as constituency responsibilities, casework and speech making were concerned. Also the slower pace of the Lords made more measured discussion possible. However, he does warn that the evidence of one measure must be treated with a degree of caution, especially when the measure concerned might be considered to fall rather ambiguously between party politics and 'moral' politics.

The greater effectiveness of the Lords apart, Rose concludes:

'basic alternative views as to whether immigration constitutes a "problem", and if it does, according to what principles a solution should be sought were not developed. Nor was the basis of the policy which the machinery established by the Bill was supposed to implement made clear at any stage in the debates. The political process which pits Government against Opposition rather than aiming to reach coherent and intelligent policies is obviously an important factor, for both Government and Opposition are concerned to score points rather than explore the complexities of an issue. This obfuscates any real consideration of ... the basic principles of a question ...'.⁴⁶

Rose's case study then, offers a number of comparisons with our own. For a start there is an immediate similarity in approach. Like Rose we have approached the study of Parliament by following the progress of certain pieces of legislation in order to assess whether there have been any shortcomings in the way Parliament has handled these particular Scottish questions. Further, the ad hoc policy response to the immigration issue that Rose unveiled is not dissimilar

to the rather ad hoc evolution of policy on Scottish divorce and homosexuality. Licensing differs slightly in this respect in that policy was derived from a Departmental Committee's recommendations.

In contrast to the immigration study where Parliament was deemed to have had a very limited effect on policy, Parliament did affect in some important respects the outcome of policy in all three of our case studies - although it has to be stressed that on each occasion there was a free vote. Thus, 'the cramping force of Party discipline' which was so important in Rose's immigration study does not feature nearly as prominently in our cases. So while Rose found that party voting strength was the important factor in resolving issues in Committee, our studies illustrate that individual contributions from Committee members can affect the final shape of legislation. See for example, the Committee vote to allow the Sunday opening of public houses in Scotland.

Lastly, the greater effectiveness of the House of Lords in influencing policy which Rose noted is also to be observed in our case studies where in a number of instances their Lordships were responsible for initiating policy or keeping an issue politically alive. However, like Rose, we must be cautious about making generalisations since our case studies all involve 'issues of conscience'. It is commonly accepted that where moral issues are concerned the role and importance of the Lords is increased. As J. R. Vincent commented in 1965:

'The House of Lords has taken up an executive and legislative role regarding problems on which the specialised opinion chiefly concerned has made its mind up, and has gained the respectful neutrality of the party managers and press, but where action cannot be expected from the ordinary movements of opinion, and which politicians do not wish to be concerned with. The procedural impasse in the House of Commons aids this tendency

considerably. In this important sense, then, the House of Lords is government - it is, by consent, and by default, the government department, as it were, principally concerned with modifications of moral tradition....'.⁴⁷

These points will be considered in greater detail when our case studies are discussed.

A series of studies which illustrate aspects of policy-making and Parliament has been undertaken by Hall, Land, Parker and Webb.⁴⁸ Under the collective title of *Change, Choice and Conflict in Social Policy*, these case studies demonstrate the interaction between pressure groups, government departments and Parliament in policy formulation. The studies review a broad range of social issues such as the introduction of family allowances, policy changes in the administration of assistance benefits, the creation of the Open University, the development of health centres, the creation of detention centres and the struggle for the Clean Air Act. This last study concerning the politics of clean air offers some relevant comparisons with our own.

The manner in which the study has been approached is very similar to the style our own case studies follow. The 'politics' of the reform is broken down into a number of different categories - the background, the events, the participants, the context, the outcome and the conclusion. This allows the development of policy to be examined over time and from a number of angles.

The study focuses on the events and circumstances which preceded the Clean Air Act 1956. Hall et al. reveal that the campaign for clean air was a struggle 'not so much against open opposition as against the reluctance, apprehension and tardiness of government in according the issue the priority it warranted'.⁴⁹ Legislation to prevent or reduce air pollution was fragmentary and largely ineffective

before 1956. The shortcomings had been noted by several committees of enquiry and, on various occasions, periods of high atmospheric pollution had led to significant increases in morbidity and mortality. Yet such evidence of the need for improved and co-ordinated clear air legislation was, to all intents and purposes, ignored by successive governments.

In December 1952 London was subjected to a dense fog of catastrophic proportions which was responsible for at least 4000 deaths. However, reaction to the catastrophe was slow to develop. There were several reasons why the government did not respond with any sense of urgency - it took time to collate mortality returns, the specific effect of the fog had to be established, ministerial responsibility for air pollution was divided between a number of departments and the post-war priority was housing production.

Mounting public concern though, in the form of articles in 'The Times', questions in Parliament and the campaigning of the National Smoke Abatement Society, led to a committee of inquiry being appointed in July, 1953. This committee, chaired by Sir Hugh Beaver, worked particularly fast and reported in November 1954. The Report's most important recommendation was that local authorities should have the power under general legislation to establish smokeless zones in which the emission of smoke from chimneys would be entirely prohibited and smoke control areas in which the use of bituminous coal for domestic purposes would be restricted.

The government indicated its acceptance of the principles of the report at the end of January 1955. The government explained this two month delay by the need for consultations with interested parties. Assurances that the government would introduce comprehensive clean air legislation within the session were given by the Minister during

the second reading debate of Gerald Nabarro's Private Members' measure early in February 1955. The question Hall et al. ask is whether, without this additional pressure and embarrassment of a Private Members' Bill, such assurances would have been given. They suggest that the government's intentions were probably to leave the issue until the next parliamentary session but that Nabarro's Bill did force speedier action.

In their analysis Hall et al. place particular emphasis on the role of the National Smoke Abatement Society which was the only group with a well established and special commitment to clear air reform. It was also the only body adequately prepared with ideas and information. Despite its limited resources it acted quickly in undertaking and distributing the results of its own survey of the smog of 1952 and in formulating evidence to Beaver. Later, it was able to brief Nabarro and provide him with a parliamentary adviser and, further, to assist other MPs during the passage of the eventual government Bill.

Parliament and backbench MPs were also important according to Hall et al. They comment:

'The role of Parliament, and especially certain backbench MPs of both parties, must not be underestimated in the clean air campaign. Their prominence in our story is a reflection of the almost complete lack of interest and involvement of either of the political parties'.⁵⁰

Hall et al. suggest that two features of this backbench intervention - parliamentary questioning and Nabarro's Private Members' Bill - were particularly important in helping to keep the issue alive.

Brookes and Richardson in their study of the environmental lobby in Britain have come to a very similar conclusion with regard to the backbench MP.⁵¹ They point out that one of the key characteristics

of the environmental issue is its straddling of conventional political cleavages. Support for environmental causes is not confined to those of a particular political persuasion so within Parliament a considerable degree of all-party concern has emerged. Here a backbench MP can undertake a number of important services on behalf of a group which has won his sympathies. He can convince colleagues, raise matters in backbench committees, and arrange meetings between group representatives and appropriate ministers. Also through his contact with ministers on a group's behalf, an MP can not only press its case, but can secure information unavailable to the group from any other source. However, Brookes and Richardson do not underestimate the importance of making direct contact with the Government:

'It is ... essential for groups to compete for the ear of the Government and to establish a consultative relationship whereby their views on particular legislative proposals will be sought prior to the crystallization of the Government's position. Failure to influence policy formation at this stage relegates the groups' role to that of fighting a rearguard action at successive stages of the policy-making process'.⁵²

In explaining policy change, then, there are certain aspects of these environmental case studies which can be compared with our own. Hall et al. identify the 'event' of the 1952 London smog as being crucial. This caused a shift in public awareness of and tolerance for a particular social risk. In our case studies on the Scottish reform of the licensing, divorce and homosexuality laws, such concrete 'events' are perhaps a little more difficult to identify. Rather than being illustrative of one major event which could be said to have been a turning point or catalyst for reform, our studies tend to highlight a series of lesser events over time which steadily established pressure for reform. In this respect they demonstrate trends in public awareness and expectations on an issue and emphasise the need to examine

policy development over a period of time and in the context of competing political priorities. For instance we shall find that a common feature of our cases is the 'sense of injustice' which appeared to develop in Scotland in the seventies when it was realised by more and more people that in respect of the law on these issues England and Wales enjoyed a number of advantages over Scotland.

Hall et al. also note that the pressures for change appear to have been generated outside the traditional bureaucracies; hence the importance of pressure groups, especially well informed single issue groups such as the National Smoke Abatement Society. We have already drawn comparisons between other single issue groups and some of those which appear in the course of our case studies, e.g. the important role of the Scottish Homosexual Rights Group in keeping the issue of homosexual law reform alive. It has further been noted by Hall et al. that a major problem in achieving change involved dispelling the apparent apathy of the government 'for without its concern and intervention little progress could be made'.⁵³ When we come to develop our case studies the significance of this statement will become increasingly apparent.

Lastly, taking up Brookes and Richardson's point concerning the need for groups to make direct contact with the Government, we shall see in our licensing study (a Government sponsored Bill but with a free vote) how important it was for groups to be part of the Scottish Office consultation network if their views were to be taken into consideration *before* or *as* legislation was being drafted.

The studies we have just outlined, then - on immigration and atmospheric pollution - demonstrate the inconsistency of Parliament's role in policy development. In the one instance it was seen how party discipline was the dominant factor in shaping the policy outcome

while in the other backbench MPs and pressure groups were seen to have a much more important role, at least in stimulating action. But, what is Parliament's typical role?

It will be recalled that Rose's starting point was the suggestion that for the most part policies appear before Parliament as 'fait accomplis'. Certainly the bulk of political science literature offering a critique of British government and administration has come to this conclusion. A recent series of policy studies by Douglas Ashford has added weight to this view.⁵⁴ Under the rubric Policy and Politics in Britain Ashford has examined a spectrum of policy issues covering administrative reform, economic policy-making, industrial relations, regional policies, social security and race and immigration policies. The approach to each of the six policy cases follows a common format. The first section analyses the context of the problem - its historical roots, competing perceptions of the problem, and its interdependence with other problems; the second deals with the agenda - the pressures generating action and the explicit and implicit motives; the third deals with process - the formulation of the issue, its attempted resolution, and the instruments involved in policy implementation; and the fourth traces the consequences of policy. It will be seen that the manner in which these studies have been undertaken is similar to the approach utilised by Hall et al. and to the approach utilised in this thesis.

The argument put forward by Ashford, though, is one which very much points to the primacy of the Executive and its bureaucracy in the formulation of policy. The increased importance of the government as a regulatory economic force, the tendency towards corporate decision-making and the increased complexity of the entire structure of government have led to the decline in importance of direct democratic control

through Parliament. The 'unique characteristic' of the British political system which Ashford notes is the high premium placed on adversarial behaviour at the uppermost levels of decision making. He observes:

'Compared to most modern democracies, the Opposition has relatively few ways to intervene in lawmaking and policy choices, the supporters of the governing majority in Parliament are themselves excluded from policy making to a remarkable degree, and the inner circle of cabinet and ministers operates under conditions of secrecy and other forms of insulation from external political forces that probably exceeds that of most democratic governments. The formulation, implementation, and evaluation of policies are subject to the judgement and priorities of a very small group of top political leaders'.⁵⁵

Ashford's view, then, is that 'parliament can do little more than cope with the consequences of policy making as eventually perceived by the public'.⁵⁶ In so far as there is a 'deliberative' stage in the legislative process, it tends to occur much earlier than the Parliamentary stages, in the interplay between political parties, pressure groups, government departments and Cabinet, which together form a complex decision-making structure involving a variety of social and political forces. Thus, the British political system, Ashford suggests, has two rather distinct sets of inputs affecting policy-making:

'... those of groups, officials, and social leaders who directly communicate with the political elite as part of the pattern of elite consensus; and a second, more familiar pattern of conventional political inputs from elections, parties, and Parliament that reflects societal consensus. So long as the values represented in the two patterns are compatible, there are not likely to be major breakdowns of government, and adversarial politics can continue to fulfill the expectations of both structures'.⁵⁷

However, while there may be two distinct sets of inputs which can affect policy development, it is the former set, involving an inner elite of politicians and officials, which is, generally speaking, paramount in determining policy. Parliament's typical role in

policy-making, then, is restricted. Only occasionally and exceptionally when a broader consensus is required can Parliament begin to influence the shape of policy.

V. Conclusion

In this chapter our purpose has been threefold - to outline the philosophical debate concerning the relationship between morality and the law; to illustrate through case studies some examples of 'moral' legislation and to compare various aspects of these studies with our own to highlight similarities and contrasts; and to examine Parliament's role in policy-making by assessing a range of issues in order to differentiate between those circumstances in which Parliament can be identified as having a prominent policy function from those in which it merely ratifies Government thinking.

We must come to the conclusion, already noted by many others, that when party-political issues are at stake, and these constitute by far the bulk of its business, Parliament is very limited in its ability to influence legislation, the principles of which have already been established by the Executive, government departments and relevant interested parties. This corresponds to the adversarial politics described by Ashford. On the other hand, there are instances where Parliament can come into its own in determining the shape of policy. This is when issues of 'morality' are at stake and, being non-party political, the whips are removed and a free vote is allowed.

Ostensibly, the Government is neutral on such occasions and does not express any opinions. Rarely though does the Government have no views whatsoever and it is important for a measure to succeed that the Government's neutrality tends towards the 'benevolent'. We noted in some of the above instances, and we will observe again in our own

case studies, that for a measure to succeed the Government must generally be sympathetic to the issue, even to the extent of allocating additional parliamentary time to ensure the completion of debates. So it might be said that, even where 'issues of conscience' are concerned, Parliament is still in many ways dependent upon the Government's appraisal of the merits (or more likely the public acceptability) of the particular issue in question. Consider for example the revelations of Crossman's Diaries of 26th September, 1967:

'This afternoon Gerald Gardiner brought forward at Home Affairs a Divorce Bill to implement the reforms recommended by the Law Commission. He said rather airily that he thought that this had been so widely accepted not only by the Law Commission but by the Archbishop's committee that it was bound to get through, without any controversy. This was greeted with a hearty roar of laughter by the Secretaries of State for Wales and Scotland who said there'd be plenty of disagreement. That brought us to a longish discussion about how to handle it. The Lord Chancellor said that it ought to be a Government measure with a free vote. I had to point out that it was an impossible operation from the point of view of the Whips. The only sensible thing was to give it to a Private Member and then provide Government time, using the technique we'd evolved for abortion and homosexuality. That requires Cabinet agreement. Personally I think this is an extremely sensible and skilful way of getting out of our difficulties in dealing with social reforms of this sort. But there are members of Cabinet who don't and that's why it will come up to Cabinet next week'.⁵⁸

Subsequent to that Cabinet meeting Crossman reports:

'The full details of the draft Bill are to be prepared in Gerald Gardiner's office and handed to a back-bencher to take responsibility for it. We shall apparently provide time whether the back-bencher wins in the ballot or not. It's moving a stage further with our new device for putting controversial legislation to the House provided that, on a free vote, the House really wants it'.⁵⁹

Thus, even where Parliament does make its mark on policy it is often a mark which already has the blessing of the Government of the day. Parliament certainly can influence policy where morality impinges

upon the law and where MPs demand to vote according to conscience, but it is an influence which is very much under the watchful eye of the Executive. Crossman has commented poignantly upon this relationship between the Executive, Parliament and the masses when issues arousing emotional responses come to the fore. Referring to Enoch Powell's famous Birmingham speech on race and immigration in April 1968 he observes:

'It's in these crises ... that the British constitution is like a rock against which the tide of popular emotion breaks, and one hopes after a time the tide will go down and the rock stand untouched. This is the strength of our system, that, though in one sense we have plebiscitary democracy, actually the leadership is insulated from the masses by the existence of Parliament. Parliament is the buffer which enables our leadership to avoid saying yes or no to the electorate in the hope that, given time, the situation can be eased away'.⁶⁰

Here then, we can see Ashford's point concerning the two distinct sets of inputs which affect policy-making. This relationship between Government, Parliament and public opinion will be discussed again.

An alternative to Ashford's view however, lies in the 'Norton view'.⁶¹ Norton is critical of the widespread view which sees the House of Commons as a body that provides unquestioning assent for the decisions of Government. Further, he queries the idea that the initiation and formulation of legislation is something largely, if not almost exclusively, undertaken by Government. While this may have been true for a good part of the twentieth century, he does not see it as being particularly applicable to the politics of the 1970s and early 1980s, which, it is suggested, have been of a rather different character.

Various proposals for parliamentary reform originated in the 1960s and were advanced in an attempt to make effective Parliament's function of scrutiny and influence. These were based on 'the perceived lowly

and inadequate role played by the Commons in the political process' and sought to make internal changes to the workings of Parliament.⁶² However, by the 1970s there was marked dissatisfaction with this limited internal approach to reform and as a result the pressure for reform became much more far reaching. Norton contends:

'It was pressure that in some cases was generated or reinforced by the indecisiveness of the 1974 general elections and the growth of minor parties, interpreted by some as a demonstration of dissatisfaction with the existing party and parliamentary system of Britain'.⁶³

According to Norton at least five separate approaches could be identified in the 1970s, although not all of them were new:

i) internal reform; ii) external reform through the introduction of a new electoral system; iii) external reform through the enactment of a Bill of Rights; iv) anti-reform (subdivided into two rather different perspectives - a) those who defended Parliament on the grounds that it performed well the tasks demanded of it, and b) those who perceived Parliament as an 'irrelevancy' in the wider socio-economic scheme of things); and v) Norton's own thesis. To this might be added another approach, that is, pressure for constitutional reform through the creation of elected devolved Assemblies. However, that aside, it is Norton's own view which is of interest here.

Norton's view emphasises the 'importance of attitudes within Parliament, and the potential and actual power available already to Members, as the basis on which the Commons might achieve an effective role of scrutiny and influence'.⁶⁴ This view draws on the experience of parliamentary behaviour in the 1970s which reveals MPs' increased willingness to dissent against the Government line. The importance of the approach he explains, is that it employs a recognition of what is as the basis of what ought to be, that is, it seeks to encourage

and promote parliamentary attitudes which have begun already to change.

Thus, despite the disparagement of Parliament, he argues that the House of Commons can and does have a role to play in the British political process. The key to more effective scrutiny and influence lies with MPs themselves. Norton argues:

'The means by which the House can achieve a greater degree of scrutiny and influence of that part of it which forms the Government exist already, but those means can be employed only if Members themselves are willing to employ them. The two elements of this approach - the powers available to the House, and the willingness of Members to employ them - have been ignored (or in some cases implicitly and not so implicitly rejected) by both internal and external reformers. Yet the House of Commons retains a basic power. If a majority of Members disagree with a proposal or motion advanced by the Government, they can vote against it in the division lobbies. The advent of party government and the consequent degree of cohesion in the division lobbies had led many to assume that this basic power had fallen into disuse. It has not. It is a power which can be, and in recent years *has* been, used by Members'.⁶⁵

Norton concedes that in the sixties such an argument would have been dismissed. However, the strength of this approach, he suggests, was to be demonstrated in the 1970s when Government backbenchers, under both Conservative and Labour administrations, proved willing to enter Opposition lobbies to impose defeats on their own front bench. And as the decade progressed, the greater was the awareness on the part of Members of what they could achieve. So much so that Norton is drawn to the rather ironic conclusion that had it not been for dissent in the 1974-79 Parliament by a number of Labour Members, Britain would now in fact have a new constitutional framework involving a devolved Scottish Assembly.

There exists, then, amongst political commentators differing points of view as to the role of Parliament and this can give rise to ambiguity and confusion concerning its functions of scrutiny and

and influence over policy. That it has ceased to form a regular part of the decision-making process is readily conceded by Norton. However, he identifies it 'as occupying an unusual place in the British political process, having an important relationship with, yet not being a major part of, the decision-making process'.⁶⁶ It is the nature of this (unusual) relationship which is to be explored in the forthcoming empirical case studies.

1. J. S. Mill, *On Liberty*, Ch. 1.
2. Report of the Committee on Homosexual Offences and Prostitution, HMSO, 1957, Cmd 247, p. 9.
3. P. Devlin, *The Enforcement of Morals*, OUP, 1965, p. 10.
4. *ibid.*, p. 11.
5. *ibid.*, p. 15.
6. H. L. A. Hart, 'Immorality and Treason' in R. A. Wasserstrom, *Morality and the Law*, Belmont, California, Wadsworth Publishing, 1971, p. 49.
7. *ibid.*, p. 54.
8. R. Dworkin, *Taking Rights Seriously*, London, Duckworth, 1977, p. 255.
9. P. Richards, *Parliament and Conscience*, London, Allen and Unwin, 1970, p. 21.
10. R. A. Wasserstrom, *op. cit.*, p. 6.
11. see T. L. Beauchamp, *Ethics and Public Policy*, New Jersey, Prentice-Hall, 1975, Ch. 6; also R. M. Dworkin, *The Philosophy of Law*, OUP, 1977, Chs. 6 and 7.
12. Richards, *op. cit.*, Ch. 5.
13. *ibid.*, p. 95.
14. see K. Hindell and M. Simms, 'How the Abortion Lobby Worked', *Political Quarterly*, 39, 1968, pp. 269-82.
15. see also L. J. Smith, 'The Abortion Law Controversy 1936-77: A Case Study in the "Emergence of Law"', Ph.D. thesis, University of Edinburgh, 1979.
16. C. Francome, 'Abortion : Why the Issue has not Disappeared', *Political Quarterly*, 49, 1978, pp. 217-222.
17. *ibid.*, p. 220.
18. B. A. Pym, 'Pressure Groups on Moral Issues', *Political Quarterly*, 43, 1972, pp. 317-27, at p. 323.
19. *ibid.*, p. 324.
20. O. R. McGregor, 'Equality, sexual values and permissive legislation: the English experience', *Journal of Social Policy*, 1, 1972, pp. 44-59, at p. 44.
21. D. Holbrook, 'The Politics of Pornography', *Political Quarterly*, 45, 1977, pp. 44-53, at p. 45.
22. *Pornography: The Longford Report*, London, Coronet, 1972; and *The Report of the Committee on Obscenity and Film Censorship*, HMSO, Cmd 7772, 1979 (Williams Report).

23. Longford Report, p. 12.
24. *ibid.*, p. 208.
25. *ibid.*, p. 387.
26. Williams Report, p. 5.
27. R. Klein, 'The Case for Elitism: Public Opinion and Public Policy',
Political Quarterly, 45, 1974, pp. 406-17.
28. *ibid.*, p. 409.
29. *ibid.*, p. 417.
30. Church of Scotland Social Responsibility Committee, Obscenity
and Community Standards, Edinburgh, The St. Andrew Press,
1979, p. 71.
31. *ibid.*, p. 74.
32. G. Drewry, 'Parliament and Hanging: Further Episodes in an
Undying Saga', Parliamentary Affairs, 27, 1973-4, pp. 251-
261 at p. 251.
33. Report of the Royal Commission on Capital Punishment 1949-53,
HMSO, Cmd 8932, 1953.
34. Richards, *op. cit.*, p. 52.
35. *ibid.*, p. 56.
36. G. T. Popham, 'Government and Smoking: Policy-Making and Pressure
Groups', Policy and Politics, 9, 1981, pp. 331-47.
37. *ibid.*, p. 334.
38. *ibid.*, p. 337.
39. H. Rose, 'The Immigration Act 1971: A Case Study in the Work of
Parliament', Parliamentary Affairs, 26, 1972-73, pp. 69-91.
40. *ibid.*, p. 70.
41. *ibid.*, p. 72.
42. *ibid.*, p. 75.
43. *ibid.*, p. 76.
44. V. Herman, 'Backbench and Opposition Amendments to Government
Legislation' in R. Leonard and V. Herman, The Backbencher
and Parliament, London, Macmillan, 1972.
45. Rose, *op. cit.*, p. 79.
46. *ibid.*, p. 82.
47. J. R. Vincent, 'The House of Lords', Parliamentary Affairs, 19,
1965-66, pp. 475-485, at p. 484.
48. P. Hall, H. Land, R. Parker and A. Webb, Change, Choice and
Conflict in Social Policy, London, Heinemann, 1975.

49. *ibid.*, p. 371.
50. *ibid.*, p. 393.
51. S. K. Brookes and J. J. Richardson, 'The Environmental Lobby in Britain', *Parliamentary Affairs*, 28, 1974-5, pp. 312-28.
52. *ibid.*, p. 319.
53. Hall et al., *op. cit.*, p. 408.
54. D. E. Ashford, *Policy and Politics in Britain: The Limits of Consensus*, Oxford, Basil Blackwell, 1981.
55. *ibid.*, p. 7.
56. *ibid.*, p. 44.
57. *ibid.*, p. 267.
58. R. Crossman, *The Diaries of a Cabinet Minister*, London, Hamilton and Cape, 1976, Vol. 2, p. 495-6.
59. *ibid.*, p. 516.
60. *ibid.*, Vol. 3, p. 30.
61. P. Norton, *The Commons in Transition*, Oxford, Martin Robertson, 1981.
62. *ibid.*, p. 201.
63. *ibid.*, p. 207.
64. *ibid.*, p. 220.
65. *ibid.*, p. 225.
66. *ibid.*, p. 243.

CHAPTER 4

Methodology

I. A Case Study Approach

The research for this thesis was undertaken by means of a case study approach. As a research method, however, the status of case studies remains somewhat dubious. The underlying doubt about the method has been whether it is possible to utilise case studies in a systematic way in order to advance theory. The criticism has been levelled that there are too many variables in the processes of policy-making to be managed by a case approach.

Roy Gregory, for instance, even though he utilised the method in his five studies of controversial amenity policy in Britain, doubts whether case-studies can be used for theory building:

'They may well suggest hypotheses of considerable interest ... but it is hard to see how the somewhat indeterminate variables that characterise administrative situations could ever be rigorously and scientifically controlled, or how hypotheses could ever be systematically tested without replicating an enormous number of cases so much alike as to become insufferably boring'.¹

Richard Simeon has also criticised the concentration on case studies in much of the existing policy literature:

'... the most common framework sometimes appears to consist of mandatory theoretical chapters at the beginning and end which bear little relationship to the detailed historical reconstruction of a set of events which takes up the bulk of the book'.²

On the other hand, Hugh Heclo, while warning against the idea that theory will grow naturally from a critical mass of cases, suggests that there is an untapped potential in the use of the method for policy analysis. He comments:

'There appears to be nothing about the case study technique which is inherently nontheoretical or

unscientific; the problem lies in assuming that theoretical contributions will emerge automatically from narrative ... Case studies may in fact have unique advantages for theory construction. Perhaps the greatest area of promise in case studies concerns their ability to "move" with the reality of dynamic factors'.³

So while the ability of the case study to test the validity of hypotheses is open to some doubt, this does not necessarily preclude, as Hall et al. have pointed out, case material from being used to *begin* conceptual analysis. The case study approach possesses qualities which can be particularly useful for policy analysis. By relating events to antecedent contexts, the case study technique can identify *process* and in this way tackle transformations in policy development. Thus, it has the potential to highlight, in Heclo's words, 'the successive differentiations in a moving but forever incomplete process of "becoming"'.⁴

Apart from this capacity to deal with policy change, another facet of the method's potential usefulness is the richness and flexibility of analysis available to it. The approach can integrate, for instance, existing historical studies, secondary sources, statistical data, surveys and interviews. Analytically, then, case studies can encompass and bring to bear a remarkable variety of factors, from individual motivations and perceptions to comprehensive socio-economic trends. And precisely because of this flexibility, case studies are especially suited to comparative analysis.⁵

At a time when positivist social research is being increasingly reappraised, the advantages of the case study may be better appreciated. The method displays many of the qualities of Bell and Newby's 'decent methodological pluralism'.⁶ They contend that it is no longer plausible to argue that there should be only one style of social research with *one* method which is to be *the* method, rather there should be many.

For Hall et al., 'the method is as effective as other approaches in suggesting general propositions about how policy develops'.⁷ They suggest that it is particularly suited to exploring the meaning actors attach to their behaviour in policy-making, an observation also made by Hofferbert. He comments that 'case studies, partly because of their narrative mode, stress the actions, hopes and expectations of individuals; it is one of their strengths that they bring to the curious student a sense of the human dimension in policy-making'.⁸

Approached rigorously, the case study, according to Becker, can force the investigator to deal with unexpected findings, and indeed, requires him to reorientate his study in the light of such developments. This requires him to consider, however crudely, the multiple inter-relations of the particular phenomena under observation.

Adhering to a few basic safeguards can assist in obtaining this necessary rigour in the case study approach. For example, Hall et al. have identified a few essential groundrules.

- i. There must be an acknowledged conceptual framework, however modest or rudimentary, with reference to which the cases are studied and conclusions drawn. There should be a set of questions which the cases are intended to help answer. In other words there has to be a delimiting *context*.
- ii. There needs to be a collection of cases sharing this common framework and concerned with a reasonably similar order of events.
- iii. There should be a comparison of cases and a search for regularities.
- iv. Since policy formation is a flow of events and actions over *time*, the chosen cases should be set in the context of other concurrent, overlapping and competing events.

Thus, Hall et al. are drawn to the conclusion that:

'if there is a conceptual framework from which to depart; if there is a reasonably similar set of cases to provide the opportunity for some cautious comparison; and if we strive to look at policy-making-through-time rather than at isolated decisions, the use of the case study approach is justifiable and profitable'.⁹

However, from a very large universe of issues or policies which might be examined, the researcher must select for his study a manageable subset of issue areas. This requires that the characteristics of the type of issue selected be explained and specified.

Becker has noted that in the beginning the researcher may not be sure what problem is the most deserving of study in the community he is working in; hence he devotes his first analytic efforts to uncovering worthwhile problems and to developing propositions that will prove most useful in tackling them.¹⁰ This experience was very much a part of the research for this thesis.

As was noted in Chapter 1 the decade spanning the late sixties to the late seventies was one of intense political flux in which the constitutional conception of Britain as a unitary centralised state was being seriously questioned. From the Scottish viewpoint criticisms were levelled that the Executive was unaccountable, bureaucracy was over-centralised, and Parliament was unable to cope with the demands of Scottish legislation. In the light of these criticisms a number of broad questions were developed as a starting point to enquire into some of the claims being made. These questions were gradually refined until a specific focus was achieved. How did Parliament operate in regard to policy issues which were specifically Scottish? Did Scotland have its own 'political system' for dealing with these issues? What was it about the issues which made them particular to Scotland? Again as Becker has observed, researchers

frequently discover that the problem they set out to study is not as important as, or cannot be studied except in the context of, some other problem they had not anticipated studying. In this way the range of Scottish policy issues of the seventies was scanned and considered in order to identify a case or cases through which it would be possible to examine these broader considerations as well as the substantive policy area involved.

In many respects the selection of cases was, like the decision-making process they were designed to illuminate, incremental. It was established early on that in 'issues of conscience' there were a number of differences in the policies which prevailed north and south of the border. One such issue was liquor licensing. Here Scotland and England not only had different licensing systems and different hours, but also different patterns of drinking and different rates of alcoholism. Scotland has traditionally had a much higher incidence of alcohol related problems and this was increasingly becoming a cause of concern. The case of the Licensing (Scotland) Act 1976, then, seemed a legitimate case to pursue as a means of studying not only a particularly serious Scottish social problem, but also the 'politics' of a specifically Scottish reform.

In selecting problems, propositions and concepts the investigator works from findings made early in the research. So as this investigator became familiar with Scottish law other law reforms began to emerge as possible subjects of enquiry. In this way it was learned that in the case of divorce, Scotland had taken some seven years longer to obtain a reform than had England. Why should this have been so? As no satisfactory explanation appeared readily available it was decided to add the case of the Divorce (Scotland) Act 1976 to the study. This was another sphere of the law where the substantive

policy was of considerable importance to a great number of Scots. The 'politics' of this reform had all the hallmarks of an intriguing case study.

Continuing along this path of enlightenment it was further discovered that (at the time the research was initiated) the law relating to homosexual conduct in Scotland had not been reformed at all, even although in England in 1967 a reform had been enacted permitting homosexual conduct in private between consenting adults over the age of 21. Although the law was subsequently reformed in 1980, through a piece of political opportunism during the passage of the Criminal Justice (Scotland) Act 1980, this could be considered to have been a Scottish 'non-decision' throughout the course of the 1970s. As well as being concerned with the rights of a Scottish minority, this case again appeared to offer a means through which broader questions concerning Scottish politics could be raised.

Thus, the cases, as well as being concerned with the substantive policy areas in question, were also selected to illustrate some aspects of 'the politics of Scottish law reform' and to examine what, if anything, constitutes the 'Scottish dimension' in such 'issues of conscience'. The cases, focusing upon the development of policy in three areas of social and moral concern in Scotland in the 1970s - liquor licensing, divorce and homosexuality - offer an empirical means by which a number of aspects of the 'Scottish political system' can be explored, political actors and organisations identified, and their interactions highlighted. Each of the cases is intended to offer insights into policy formulation in Scotland by investigating policy change as both 'an intellectual activity and an institutional process'.

Not only do the cases afford a means of exploring Scottish culture and Scottish administrative practice, they also offer a means

for illuminating the interaction between the Scottish and British 'political systems'. These issues of conscience demonstrate, to some extent, the duality apparent in the Scottish system, which can appear both dependent and independent within the larger British system. On the one hand each of these cases has a distinct historical and legal tradition and has required separate legislation, but on the other, the need for social justice and equality before the law throughout Britain, has meant there has been pressure to conform to patterns already established in England.

The cases, then, have been chosen with as much regard as possible to the groundrules suggested by Hall et al. A combination of approaches, with reference to which the cases will be studied and conclusions drawn, has been outlined in Chapter 2. The cases form a collection of 'issues of conscience' in Scotland which reflect Scottish social, moral and political ambiguities as observed in Chapter 1. They have been compared in Chapter 3 with other similar studies, and further comparisons will be drawn in the concluding chapter. And the formulation of policy can be examined over time and in the context of other overlapping and competing events as suggested, again, in Chapter 1.

II. Sources of Information

During the course of the research for this thesis several sources of information were utilised. They can be categorised in the following manner:- i) existing literature; ii) Government and Parliamentary Papers; iii) unpublished pressure group records and submissions; iv) newspaper reports and articles; and v) interviews.

Categories i) and ii) are self-explanatory. Categories iii) and iv) require a few words of explanation. Category v) will be dealt with separately in the next section.

The bulk of the pressure group records and submissions referred to were those related to the Departmental Committee on Scottish Licensing Law. Excluding written evidence submitted by individual members of the public there were around 150 representations made to the Committee by interested organisations. Access to all these papers was eventually achieved but not before a number of difficulties were overcome.

An initial approach was made in early November 1979 to the Assistant Secretary of the Criminal Justice and Licensing Division of the Scottish Home and Health Department for permission to view the Clayson papers in the Scottish Office files. This was met with the official reply that as the submissions had not been made public they fell within the '30 year rule'. Under this rule public access to confidential Government documents was prohibited for thirty years, after the original date of filing. It was regretted that permission to view could not be granted, *unless* the consent of each organisation was obtained.

Out of the 150 or so organisations the addresses of about 100 were traced. To them a letter was sent requesting permission to view their submission in the Scottish Office files and enquiring as to what additional information they themselves might have on record. Virtually everyone replied in some form or another. Around 25 enclosed copies of their submission along with any other relevant material they had, e.g. correspondence with the SHHD on the issue, minutes of any internal group meetings. All the responses gave permission to view whatever material of theirs was on file in the Scottish Office - with the exception of one. The Crown Office refused to allow access but gave no reason other than to state that the submission was 'confidential'.

Armed with around 100 letters of consent and also the consent of the Chairman of the Committee, Dr. Clayson, another approach was made to the Scottish Office. This time my acting supervisor wrote on my behalf directly to the Minister responsible, Mr. Malcolm Rifkind, explaining the situation in full and again requesting permission to view the Clayson papers. In light of this representation the Minister waived the 30 year ban and authorised access to the submissions made to the Clayson Committee.

The files that were made available to me contained all the evidence taken by the Committee. This consisted of both written and oral evidence submitted by organisations and individual members of the public. The quality of this evidence varied dramatically and this is discussed in Chapter 5. As well as this evidence, correspondence between pressure groups and the SHHD was lodged in the files. Also on hand were the comments of Mr. A. Simmen, Secretary to the Committee. He summarised each submission, drew the attention of the Committee to any points of interest and made recommendations about the significance and merit of each contribution.

The minutes of the Committee's deliberations were not contained in these files. At first this was considered to be a drawback but subsequent information revealed that these minutes had been non-attributive in that individual views were not recorded. Information concerning the Committee's deliberations was later obtained from interviews with Committee members.

Access to Government deliberations and decisions after the Clayson Report had been published and opinions canvassed was not granted. In Chapter 1 we noted the general secrecy that pervades the operation of the Scottish Office so access to the internal decision-making process was not expected. This was something of a handicap

since these records would have shed light on the influence of civil servants in the policy process.

As far as the other two studies were concerned the number of interest groups involved was a great deal smaller since there were no separate Scottish inquiries into either divorce or homosexuality. Hence the material available was more limited in scope. Of particular importance though, were the records obtained from the files of the Church of Scotland which charted the development of Church policy on divorce and homosexuality over the last two decades. Similarly, the documents obtained from the Catholic Press and Media Office in Glasgow were also important in understanding the views of the Roman Catholic Church in Scotland on these issues.

Gaining access to newspaper records also proved difficult. It was found that the University of Edinburgh Library had on microfilm back issues of 'The Times', 'The Scotsman' and the 'Glasgow Herald'. However, of these the Library only possessed a catalogue for 'The Times'. After enquiries it was discovered that the 'Glasgow Herald' catalogue had been discontinued in the early sixties, and that 'The Scotsman' had never produced such a compendium. Without a subject catalogue it was impossible to locate relevant articles unless their date was already known. Random scanning to identify features was not feasible given the sheer volume of material on hand. The irony, and the frustration, was that the sources were available but the means to utilise them (with the exception of 'The Times' catalogue) were not.

It was therefore decided to approach 'The Scotsman' for permission to use its archives. An initial and informal approach was made to a journalist friend on the staff of 'The Scotsman'. After enquiries he regretted to inform me that it was not normal practice to allow 'external' researchers into 'The Scotsman' Library. At this

point a second and more formal approach was made by my supervisors on my behalf to have normal regulations relaxed. However, the same response was forthcoming - that the Librarian did not permit 'outsiders' to use the archive facilities within 'The Scotsman' offices.

Consideration was then given to approaching other Scottish newspapers. In the interim though, the visit to the Catholic Press recorded above yielded an unexpected result, for not only did this office have documents pertaining to Roman Catholic doctrine and policy, it also possessed files of newspaper cuttings on various social and moral issues in Scotland from the early 1970s onwards. The relevant files on licensing, divorce and homosexuality contained a good selection of press clippings and it is this material which has been used in the thesis.

Such good fortune, however, did not continue when it came to gathering opinion poll data on our issues of conscience. Several survey organisations were contacted, amongst them National Opinion Polls (NOP), Opinion Research Centre (ORC), Social Surveys (Gallup Poll), Market and Opinion Research International (MORI) and System Three Scotland. All of these organisations replied courteously and sent poll data which they thought might be useful. The problem was that the information applied, in the main, to British surveys on moral issues. Very little, if any, separate Scottish opinion poll material on moral issues appears to exist. This was a big disadvantage as one of the aims of the thesis was to compare Scottish and English public opinion on our issues of conscience. Where the available material was considered useful it has been included in the text. Otherwise it has been left out.

III. The Interviews

Over a nine month period from July 1980 to March 1981 30 interviews were conducted with a series of political actors who were selected as being 'key informants'. In addition 2 supplementary interviews were undertaken in November 1982 to check information and verify particular points. The selection of these particular respondents was based on the significance of their contribution to policy development in one or more of the cases under consideration. Significant contributions were identified by a process of elimination. While this involved a matter of personal judgement the assessment was carried out as rigorously as possible using all the written information available at the time.

For each case study a list was compiled of all those known to have been involved in some way. Each list was then divided into pressure groups, Committee of Inquiry personnel (where applicable), MPs and members of the House of Lords. The size of these lists varied, liquor licensing being the largest since it included the 150 or so representations to the Clayson Committee. This had to be reduced to manageable proportions. Minor submissions were easily identifiable and these were eliminated at the outset. Those remaining were then reduced by classifying under a single heading groups of a similar kind, e.g. The British Medical Association, the Royal Colleges of Edinburgh and of Glasgow, and the Institute of Psychiatry were classified under the collective rubric 'medical interests'. Other categories included the licensed trade, the churches, legal organisations, the police, and youth organisations. These were then considered for possible interview (Table 4.1).

The pressure group subdivisions of the other two lists, divorce (Table 4.2) and homosexuality (Table 4.3) were much easier to handle.

TABLE 4.1 Licensing - Provisional list of issues

- A. 1. Misuse of alcohol - Scottish 'traditions' and rate of alcoholism.
 2. Licensing authority - administrative/judicial debate.
 3. Licensing system and types of licence.
 4. Permitted hours - Sunday opening, later closing, etc.
 5. Protection of youth - abuse from off-sales, age limit, notion of 'family' pubs.
 6. Temperance polls.
 7. Tourism.
 8. Registered clubs.
 9. Research and monitoring of change/public attitudes.
- B. Pressure groups' interests:
 Tourist bodies 4. 7.
 Residential protection groups 3. 4. 6. 8.
 Medical interests 1. 4. 5. 9.
 Temperance bodies 1. 3. 4. 5. 6. 9.
 Religious organisations and Churches 1. 3. 4. 5. 6. 8. 9.
 Clubs 2. 3. 4. 5. 8.
 Political/economic/administrative bodies 3. 4. 5. 7. 8.
 Consumer groups 1. 3. 4. 5. 8.
 Youth groups 1. 4. 5. 6.
 Trade - (a) Brewers and Distillers 2. 3. 4. 5. 6. 7.
 (b) Managers and Staff 3. 4. 5. 6. 7.
 Police 1. 3. 4. 5. 8. 9.
 Legal societies 2. 3. 6. 8.
 Sporting and leisure groups 3. 4.
 Student associations 4. 8.
- C. Provisional list of groups rated for possible interview
- a) Tourist:
 Scottish Tourist Board
 British Hotels and Restaurants Association (Scottish Division)
 British Transport Hotels Limited.
- b) Residential:
 Central New Town Association of Edinburgh (or any similar residents association).
- c) Medical:
 British Medical Association (Scottish Division)
 Institute of Psychiatry
 Royal College of Physicians.
- d) Temperance:
 Scottish Temperance Alliance.
- e) Church of Scotland
 Roman Catholic Bishops
 Free Church of Scotland
 Free Presbyterian Church of Scotland
 United Free Church of Scotland.
- f) Clubs:
 Working Men's Club and Institute Union Limited (or any similar)

TABLE 4.1 (continued)

- g) Political/economic/administrative:
 - STUC
 - CBI in Scotland
 - Scottish League of Young Liberals
 - Scottish Young Conservatives
 - Association of County Councils (now COSLA)
 - Corporations of the 4 cities (now District Councils).
- h) Consumer:
 - Scottish Council for Civil Liberties.
- i) Youth:
 - Advisory Group on Youth-at-Risk
 - E.I.S.
 - Standing Conference of Voluntary Youth Organisations
 - Scouts/Boys Brigade/Girl Guides
 - YMCA/YWCA.
- j) Trade:
 - 1) Brewers Association of Scotland
 - International Distillers and Vintners Limited
 - 2) Licensed Grocers' and Wine Merchants' Association
 - National Association of Licensed House Managers
 - Scottish Licensed Trade Association.
- k) Police:
 - Association of Chief Police Officers.
- l) Legal:
 - Faculty of Advocates
 - Law Society of Scotland
 - Scottish Law Agents Society
 - Scottish Law Commission.
- m) Sporting and leisure:
 - Cinematograph Exhibitors' Association (Scottish Branch)
 - British Bingo Association
 - Scottish Sports Council.
- n) Student:
 - e.g. University of Edinburgh SRC.

TABLE 4.2 Divorce - Provision list of issues

- A.
 - 1. Number of Bills presented and overall delay.
 - 2. Parliamentary time allocated to English Bill but not to Scottish.
 - 3. Nature of public opinion/MPs and their information.
 - 4. Procedure for private members' Bills, esp. Scottish Bills.
 - 5. Irretrievable breakdown as sole ground.
 - 6. Obstructionist stance of certain MPs.
 - 7. 'Radicalism' of the proposals of the Church.
 - 8. Law to be comparable with, or different from, England.
 - 9. Jurisdiction of courts.
- B. Pressure groups' interests:
 - Churches 1. 3. 5. 7. 8.
 - Legal societies 1. 5. 7. 8. 9.
 - Equal rights groups 5. 8. 9.

TABLE 4.3 Homosexuality - Provisional list of issues

- A.
 - 1. 1967 English Act
 - 2. Consenting adults in private - morality/criminality debate
 - 3. Level of prosecutions Scotland/England
 - 4. Scottish Consolidation Bill - Section 7.
 - 5. Anomalies in law - Scotland/England
- B. Pressure groups' interests:
 - Churches 2. 4. 5.
 - Legal societies 2. 3. 4. 5.
 - Scottish Minorities Group 1. 2. 3. 4. 5.
 - Police 2. 3. 4.
 - Equivalent English groups 1.

Here the number of groups was much smaller involving only the churches, legal organisations, and civil liberty groups in each case. They therefore virtually chose themselves.

As far as Committee of Inquiry personnel were concerned, only those who sat on the Departmental Committee on Scottish Licensing Law under the Chairmanship of Dr. Christopher Clayson, were involved (Table 4.4). Out of a Committee of twelve, five, including the Chairman, were selected for interview. This selection was based as much as anything on the current whereabouts and availability of the Committee members. Those who could be located and agreed to talk were interviewed.

The selection of MPs for interview was again by a process of elimination, but here the assessment was based on how prominently they had featured in the parliamentary debates on each of the cases. The list of MPs for each case included everyone who had made a contribution on Second Reading, in Committee, or on Report, as well as those Lords who had spoken in the Upper House. Minor contributions involving perfunctory interjections on matters of detail were easily identified and those MPs were eliminated from further consideration. The remaining MPs in each list were then considered as possibles for interview (Tables 4.5, 4.6, 4.7). These lists were then compared and another list, based on cross reference, was drawn up (Table 4.8). MPs who were identified as having been involved in all three case studies were marked accordingly. Similarly, MPs who participated in any two studies were also identified and marked. And lastly some of those who had been concerned with only one of the three cases were recorded. In this way a list of 'key informants' was compiled. Interview plans were then drafted on the basis of whether the respondent would be answering questions on all three, only two or just one of the cases under consideration.

TABLE 4.4 Departmental Committee on Scottish Licensing Law.

Dr. C. W. Clayson
Mr. W. M. Campbell
Mr. James F. Falconer
Miss Morag C. Faulds
Mr. E. Frizzell
Mr. A. W. Hardie
Prof. T. L. Johnston
Mr. John Kerr
Mr. Maitland Mackie
Mr. Ben Smith
Dr. John D. Sutherland
Mrs. A. S. Thom

TABLE 4.5 Licensing - MPs and Peers involved

Committee

Peter Doig (Lab. Dundee West)
 Richard Buchanan (Lab. Glasgow Springburn)
 Alick Buchanan-Smith (Cons. North Angus and Mearns)
 Ian Campbell (Lab. Dumbartonshire West)
 Robin Cook (Lab. Edinburgh Central)
 John Corrie (Cons. North Ayrshire and Bute)
 J. M. Craigen (Lab. Glasgow Maryhill)
 James Douglas-Hamilton (Cons. Edinburgh West)
 Harry Ewing (Lab. Stirling, Falkirk and Grangemouth)
 Nicholas Fairbairn (Cons. Kinross and West Perthshire)
 John Gilmour (Cons. Fife East)
 James Hamilton (Lab. Bothwell)
 Tom McMillan (Lab. Glasgow Central)
 M. S. Miller (Lab. East Kilbride)
 Hector Munro (Cons. Dumfries)
 Malcolm Rifkind (Cons. Edinburgh Pentlands)
 Teddy Taylor (Cons. Glasgow Cathcart)
 Hamish Watt (SNP, Banffshire)
 James White (Lab. Glasgow Pollok)
 Alexander Wilson (Lab. Hamilton)

Others

Norman Buchan (Lab. West Renfrewshire)
 Dennis Canavan (Lab. West Stirlingshire)
 Alex Fletcher (Cons. Edinburgh North)
 Robert Hughes (Lab. Aberdeen North)
 Russell Johnston (Lib. Inverness)
 John Mackintosh (Lab. Berwick and East Lothian)
 Bruce Millan (Lab. Glasgow Craigton)
 George Reid (Lab. East Stirlingshire and Clackmannan)
 John Robertson (Lab. Paisley)
 Willie Ross (Lab. Kilmarnock)
 Iain Sproat (Cons. Aberdeen South)
 David Steel (Lib. Roxburgh, Selkirk and Peebles)
 Donald Stewart (SNP Western Isles)
 Gordon Wilson (SNP Dundee West)

Lords

Aberdare	Henderson
Balerno	Kinnaird
Campbell of Croy	Kirkhill
B. Delacourt-Smith of Altem	Lyons of Brighton
B. Elliot of Harwood	Stabolgi
Gray	Tanlaw
Guest	Wilson of High Wray

TABLE 4.6 Divorce - MPs and Peers involved

Committee (1976 Bill)

Margaret Bain (SNP Dumbartonshire East)
 Robin Cook (Lab. Edinburgh Central)
 James Douglas Hamilton (Cons. Edinburgh West)
 Harry Ewing (Lab. Stirling, Falkirk and Grangemouth)
 Nicholas Fairbairn (Cons. Kinross and West Perthshire)
 Tom Galbraith (Cons. Glasgow Hillhead)
 Robert Hughes (Lab. Aberdeen North)
 Douglas Henderson (SNP Aberdeenshire East)
 Lord Advocate (Ronald King Murray) (Lab. Edinburgh Leith)
 Iain MacCormick (SNP Argyll)
 John Mackintosh (Lab. Berwick and East Lothian)
 George Reid (SNP East Stirlingshire and Clackmannan)
 Malcolm Rifkind (Cons. Edinburgh Pentlands)
 Harry Selby (Lab. Glasgow Govan)
 William Small (Lab. Glasgow Garscadden)
 Iain Sproat (Cons. Aberdeen South 1970-)

Others

Donald Dewar (Lab. Aberdeen South 1966-70)
 Sir Myer Galpern (Lab. Glasgow Shettleston)
 Sir John Gilmour (Cons. Fife East)
 Hamish Gray (Cons. Ross and Cromarty)
 Willie Hamilton (Lab. Fife Central)
 John Smith (Lab. Lanarkshire North)

Lords

Campbell of Croy
 Kirkhill
 Selkirk
 Wilson of Langside

TABLE 4.7 Homosexuality - 'non-reform of' - MPs and Peers involved
Sexual Offences (Scotland) Bill 1976 - consolidation

Leo Abse (Lab. Pontypool)
Robin Cook (Lab. Edinburgh Central)
Robert Hughes (Lab. Aberdeen North)
Lord Advocate (Ronald King Murray) (Lab. Edinburgh Leith)
Malcolm Rifkind (Cons. Edinburgh West)
David Steel (Lib. Roxburgh, Selkirk and Peebles)

Lords

Beaumont of Whitley
Boothby
Campbell of Croy
Ferrier
Hughes
Kirkhill
Monson
Strathclyde.

TABLE 4.8 Provisional list of MPs rated for possible interview.

Robin Cook	L. D. H.
Robert Hughes	L. D. H.
Malcolm Rifkind	L. D. H.
David Steel	L. H.
James Douglas-Hamilton	L. D.
Harry Ewing	L. D.
Nicholas Fairbairn	L. D.
George Reid	L. D.
Iain Sproat	L. D.
Donald Dewar	D.
Tam Galbraith	D.
Iain MacCormick	D.
Alick Buchanan-Smith	L.
Dennis Canavan	L.
Neil Carmichael	L.
Hector Monro	L.
Willie Ross	L.
Teddy Taylor	L.
Leo Abse	H.
Tam Dalyell	
Lords	
Campbell of Croy	L. D. H.
Kirkhill	L. D. H.
Guest	L.
Boothby	H.

Once the 'key informants' had been identified they were then approached by letter for an interview. Table 4.9 shows those who were interviewed and Table 4.10 lists those who did not accept the invitation. Interviews were declined on a number of grounds. Some respondents said they were too busy, some thought their comments would be of limited value, and some simply declared themselves unavailable. All the refusals were polite with the exception of one which was abrupt and discourteous. Nicholas Fairbairn wrote:

'I am astonished to learn that you have spent two years developing a study into the campaigns to change the legislation in Scotland on licensing, divorce and homosexuality. I am sorry to say this seems to me a grotesque waste of time and money and I see no purpose in an interview'.¹¹

Of those who agreed to an interview some replied offering a definite time, date and location, while others requested that a telephone call be made to specify the details of the meeting. Interviews were always held at a time and date which was convenient for the respondent. Locations varied according to circumstances. Generally, interviews with pressure groups' representatives were held at their office. Interviews with members of the Clayson Committee were conducted at their present place of work, although Dr. Clayson himself generously entertained me in his own home. And interviews with MPs were undertaken either at the MPs surgery or at the House of Commons. Two separate week long visits were made to London to conduct the interviews at the House of Commons, one in November 1980 and the other in March 1981.

A 'specialised' approach to the interviews was adopted.¹² This meant simply that each respondent was given special, non-standardised treatment which involved stressing the respondent's definition of the situation and encouraging him to give his own account of that situation.

TABLE 4.9

Persons Interviewed

A. Pressure Groups:

Dr. R. Parry, British Medical Association
 Dr. D. Player, Scottish Health Education Group
 Miss I. Grigor, Church of Scotland
 Mr. N. Rose, Law Society of Scotland
 Mr. K. McGregor, Law Society of Scotland
 Mr. N. Whitty, Scottish Law Commission
 Mr. R. Thomasson, Educational Institute of Scotland
 Supt. C. Bowman, Association of Chief Police Officers (Scotland)
 Mr. E. Ridehalgh, Scottish Licensed Trade Association
 Mr. G. Reed, Brewers Association of Scotland
 Mr. A. Mowat, Scottish and Newcastle Breweries
 Mr. Morrison, Scottish Tourist Board
 Mr. I. Dunn, Scottish Homosexual Rights Group

B. Departmental Committee on Scottish Licensing Law

Dr. C. Clayson (Chairman)
 Mr. W. M. Campbell
 Mr. J. Kerr
 Dr. J. Sutherland

C. MPs

Mr. Leo Abse (Labour, Pontypool)
 Mr. Alick Buchanan-Smith (Conservative, North Angus and Mearns,
 Under Secretary of State, Scottish Office 1970-74)
 Mr. Neil Carmichael (Labour, Glasgow Kelvinside)
 Mr. Dennis Canavan (Labour, West Stirlingshire)
 Mr. Robin Cook (Labour, Edinburgh Central)
 Mr. Donald Dewar (Labour, Glasgow Garscadden)
 Lord James Douglas-Hamilton (Conservative, Edinburgh West)
 Mr. Harry Ewing (Labour, Stirling, Falkirk and Grangemouth,
 Under Secretary of State, Scottish Office 1974-79)
 Mr. Robert Hughes (Labour, Aberdeen North)
 Lord Kirkhill (Minister of State, Scottish Office 1975-78)
 Mr. Bruce Millan (Labour, Glasgow Craigton, Secretary of State
 for Scotland 1976-79)
 Mr. Malcolm Rifkind (Conservative, Edinburgh Pentlands, Under
 Secretary of State, Scottish Office 1979-82)
 Mr. Iain Sproat (Conservative, Aberdeen South)

D. Supplementary

D. J. Cowperthwaite (Under Secretary, Scottish Home and Health
 Department 1974-81)
 Lord Murray (Lord Advocate 1974-79)

TABLE 4.10

Persons unavailable for interview

1. Mr. Tam Dalyell (Labour, West Lothian). Chosen because of his involvement in Scottish affairs in the 1970s but declined on the grounds that he had little to say about these 'issues of conscience'.
2. Mr. Nicholas Fairbairn (Conservative, Kinross and West Perthshire). Declined through lack of interest.
3. Mr. Tam Galbraith (Conservative, Glasgow Hillhead). Declined interview, but explained his position in letter.
4. Mr. Russell Johnston (Liberal, Inverness). Declined through lack of time.
5. Mr. David Steel (Liberal, Roxburgh, Selkirk and Peebles). Declined through lack of time.
6. Mr. Teddy Taylor (Conservative, Glasgow Cathcart). Declined through lack of time.
7. Lord Boothby. Graciously declined because at the age of 81 had decided to retire from 'active politics' and was 'giving no more interviews to anyone about anything'!
8. Lord Campbell of Croy (Secretary of State for Scotland 1970-74). Declined through lack of time.
9. Lord Guest (Chairman of the Committee on Scottish Licensing Law 1960-62). Declined but stated no reason.
10. Lord McCluskey (Solicitor-General, 1974-79). No reply.
11. Lord Ross of Marnock (Secretary of State for Scotland, 1964-70; 1974-76). Declined through lack of time.
12. Professor T. L. Johnson (Member of Clayson Committee). No reply.

In this way the respondent was allowed to introduce what he regarded as relevant.

Thus, the aim of the interviews was to focus the respondent's attention upon a given occasion and its effects. While each interview varied to meet the circumstances of the respondent, the interviews were structured in so far as they adhered to a general pattern. Firstly, the persons interviewed were, for the most part, known to have been involved in one or more of the case studies. Secondly, the political background and context, and the events and participants in each case had been previously analysed. From this analysis a set of questions was developed to enquire into particular aspects of each case. Thirdly, an interview plan was developed utilising questions of both a general and specific nature to probe the respondent's subjective understanding of the issues. Here it was equally important to consider what a respondent did *not* know or did *not* think relevant, as what he did. There were no hard and fast rules for this. In each instance one had to measure the response against other testimonies and available information.

While a formal interview plan with set questions and probes was prepared for each interview, it was kept as flexible as possible to allow questions to be interchanged as circumstances dictated. In this respect the emphasis was always upon making the interview an informal discussion. The length of the discussion usually ran somewhere between 45 minutes and one hour.

Responses were recorded by taking notes during the course of the interview. Space was left after each question to allow the reply to be recorded directly next to it. Note taking was selective with particular emphasis being placed on nuances and turns of phrase which would indicate the respondent's opinions in his own words. A tape

recorder was not used for three main reasons. Firstly, for the type of information to be collected, it was felt that note taking was more convenient and just as effective as using a tape recorder. Secondly, transcribing from tape recordings was considered to be too time consuming. And thirdly, tape recorders were not allowed into the Houses of Parliament where a number of interviews were to take place. After an interview had been conducted it was written up as quickly as possible to minimise the risk of forgetting details.

Assessing what kind of 'truth' one obtains from an interview presents, perhaps, one of the greatest difficulties involved in qualitative interviewing. The problem, though, is not insurmountable. One might begin with the simple and charitable assumption that on the whole people will seek to tell you the truth. Therefore, one might be predisposed to believe them unless there were good reasons for not doing so. However, the difficulties in interpreting informant's subjective reports are seriously increased when the informant is reporting not his present feelings or attitudes but those he recollects from the past. This is because of the widespread tendency we all have to modify a recollection of past feelings in a selective way that fits more comfortably into our current point of view. Philip Williams has noted that this is especially true of politicians:

'More frequently, politicians subconsciously adapt their views about the past to fit a stance they have adopted later; for they like the rest of us feel uncomfortable holding contradictory beliefs side by side, they more than most people find that such contradictions cause them to function less effectively, and they above all must give immediate battles primacy over the quarrels of the distant past'.¹³

This propensity to interpret the past in light of the present means that one cannot accept everything a respondent says at face value. There are, however, a number of checks which assist in

detecting distortion. First of all, there is an important negative check - implausibility. If an account strongly strains our credulity and just does not seem at all plausible, then we are justified in suspecting distortion. A second aid in detecting distortion is any knowledge we have of the unreliability of the informant. A third is our knowledge of an informant's assumptions and how they might influence his perception and interpretation of events. However, the major way to detect for distortion, and correct for it, is by comparing an informant's account with the accounts given by other informants.

Dean and Whyte have commented:

'by the thoughtful use of the information revealed in the account of one informant, the researcher can guide other interviews toward data which will reveal any distortions incorporated in the initial account and usually will provide details which give a more complete understanding of what actually happened'.¹⁴

Therefore, a proper caution about accepting oral evidence can justify seeking more of it for purposes of cross-checking. So up to a point the method yields increasing returns. It happened on a number of occasions during the course of the research, that a record of an informant's comment, which at the time had seemed unimportant or hardly relevant, took on a new significance in the light of later information, so that a subsequent re-reading and comparison of interviews bearing on the same period or incidents would often show them to be much more useful and revealing than one had realised at the time of recording them.

Most of the doubts expressed about interview evidence can also apply to some extent to other sources which social science researchers do not spurn, from autobiographies to political speeches to government reports. Therefore, as Philip Williams has noted:

'The wise interviewer may be wary of accepting in full the uncorroborated evidence of a single witness, but that is no reason for regarding any written source as necessarily superior to several items of oral testimony, properly checked and cross-checked, which confirm and complement one another'.¹⁵

By placing the emphasis on the respondent's subjective construction of the situation a problem can arise over validity in inference. It is, though, possible to protect against this by adopting the technique of 'triangulation', that is of employing a variety of methods to approach the same data. Yet there still tend to remain doubts about making judgements concerning the informant's 'values' or motives. Ken Young, however, suggests that we are too much influenced and intimidated by a standard of validity that arises from formalised mass survey techniques. He points to the fact that a number of professionals, such as doctors, personnel managers, and social workers, carry out interviews and similar encounters with the aim of making judgements about the respondent. Thus, for researching political actor's values he advocates a 'diagnostic' form of interview. He asserts:

'... the intuitive standard of "validity" used by the diagnostic professions - judgement, experience, empathy - is probably more relevant to the task of researching the assumptive world of political actors than standards associated with other more technical constructions of the term'.¹⁶

Despite Young's clever way around the issue subjectivist approaches do remain problematic as instruments for understanding the policy process. Nevertheless, provided they are used in conjunction with other methods they can help to illuminate some assertions about policy-making and the motivations and behaviour of those involved in the policy-process. John Edwards contends that it is in this respect that subjectivist approaches are most self-evidently useful 'if assertions are made about the dominant determinants of or influences on policy they

may be amenable to testing through a clearer understanding of key actor's definitions of the situations, constructions of reality and motivations'.¹⁷ Thus, subjectivist approaches can be used to complement other approaches. However, the problem for the researcher of gaining access to 'reality' is not resolved by the rejection of positivist scenarios and the adoption of subjectivist ones since both in the end fail to account for the hermeneutic nature of all knowledge. 'Ultimately', says Edwards, 'subjectivist accounts provide only an alternative truth not a better one'.¹⁸

1. R. Gregory, *The Price of Amenity: Five Studies in Conservation and Government*, London, Macmillan, 1971, p. 13.
2. R. Simeon, 'Studying Public Policy', *Canadian Journal of Political Science* 9, 1976, pp. 548-80 at p. 551.
3. H. Heclo, 'Review Article: Policy Analysis', *British Journal of Political Science* 2, 1972, pp. 83-108 at p. 93.
4. *ibid.*, p. 94.
5. see for example, A. L. Webb, 'Planning Enquiries and Amenity Policy', *Policy Politics* 1, 1972, pp. 65-74.
6. C. Bell and H. Newby (eds), *Doing Sociological Research*, London, Allen and Unwin, 1977, p. 10.
7. P. Hall, H. Land, R. Parker and A. Webb, *Change, Choice and Conflict in Social Policy*, London, Heinemann, 1975, p. 16.
8. R. I. Hofferbert, *The Study of Public Policy*, New York, Bobbs-Merrill, 1974, p. 94.
9. Hall et al., *op. cit.*, p. 17.
10. H. S. Becker, 'Social Observations and Social Case Studies', *International Encyclopedia of the Social Sciences*, 11, 1968, pp. 232-8.
11. Nicholas Fairbairn, Q.C., M.P., Letter, 10th November, 1980.
12. see L. A. Dexter, *Elite and Specialized Interviewing*, Evanston, Northwestern University Press, 1970.
13. P. M. Williams, 'Interviewing Politicians: The Life of Hugh Gaitskell', *Political Quarterly*, 51, 1980, pp. 303-16 at p. 310.
14. J. P. Dean and W. F. Whyte, 'How Do You Know If the Informant is Telling the Truth?' in Dexter, *op. cit.*, p. 129.
15. Williams, *op. cit.*, p. 312.
16. K. Young, 'Values in the Policy Process', *Policy and Politics*, 5, 1977, pp. 1-22, at p. 15.
17. J. Edwards, 'Subjectivist Approaches to the Study of Social Policy Making', *Journal of Social Policy*, 10, 1981, pp. 289-310, at p. 307.
18. *ibid.*, p. 310.

CHAPTER 5

The Departmental Committee on Scottish Licensing Law:
Its Role in Policy Development.

I. Introduction

At this point the thesis will turn to consider our empirical case studies in the light of the concepts and ideas outlined so far. The next two chapters will deal with our first study on the reform of the Scottish drink laws. This chapter is specifically addressed to the Departmental Committee on Scottish Licensing Law (The Clayson Committee) which had a broad remit to review the liquor licensing laws of Scotland and to make recommendations on what changes might be made in the public interest. Chapter 6 then considers the legislative response to the Clayson Report.

One of the main themes developed in Chapter 2 was that Scotland, by virtue of its historical development - being assimilated into the British state politically but maintaining a distinctive 'civil society' - had developed a distorted political culture which Naim described as 'cultural sub-nationalism'. This manifested itself in many ways in Scottish society - in popular literature, in sport, in the Church, and in many other areas which had become associated with a particular 'Scottish way of life'. One of those areas which had become associated with Scottish popular tradition was the Scottish attitude towards drink. In the first part of this chapter we shall explore aspects of this issue in an attempt to separate myth from reality.

The opening section (Section II) deals with the social and historical context of drinking and its control in Scotland. Here we trace some of the historical differences in the evolution of the licensing systems north and south of the border. We find that the licensing law in Scotland had not always been as restrictive as it was in the

20th century and that even this restriction was the prolongation of a measure intended only as a temporary limitation during the First World War.

The ambivalent attitude towards the consumption of alcohol in Scotland is then discussed. On the one hand it is seen as a sign of sociability, but on the other it is also perceived as a dangerous and addictive drug if taken in excess over a long period. Thus temperance movements, founded on a strong Calvinist anti-drink tradition, arose in great numbers in Victorian Scotland to condemn the excessive use of alcohol. In opposition to this the use of alcohol in Scotland acquired a symbolic value 'of considerable importance to the self-esteem of the individual and of the nation'.

The problems created by this ambivalent culture are then examined. The legacy of this 'cultural neurosis' is that contemporary Scotland has a very much higher proportion of alcohol related problems and disabilities than England and Wales where there has been a more relaxed approach to the consumption of alcohol. Some statistical evidence is then produced to demonstrate the extent of these problems in comparison with south of the border. Against this social and historical background the pressures for contemporary reform are identified and the genesis of the Clayson Committee mapped out.

The remainder of the chapter examines the approach of the Clayson Committee in dealing with drinking and its control in Scotland. Section III considers the appointment of the Committee and Section IV its 'approach' to the problem. Section V outlines some comparative developments in England before Section VI sets out the main issues and the nature of the arguments. The Committee's assessment of the evidence is dealt with in Section VII, its mode of decision-making in Section VIII and the effectiveness of its participatory process in Section IX.

In discussing these issues some of the ideas outlined in Chapter 2 on approaches to policy analysis are drawn upon, the aim being to identify the balance of forces which prevailed in the different phases of policy formulation. Of particular relevance here are the concepts of group theory and demand regulation. It was noted in the earlier chapter how the 'package' of interests associated with a particular policy option can affect whether that option is adopted. The status of a group is another factor which can affect the way policy is determined, those groups with a high standing in the community being granted virtually automatic participation in the consultation process. This chapter will consider in some detail how such factors operated in the case of the Clayson Committee and in what way they influenced the recommendations of the Committee.

The part values played in the decision-making process will also be considered. The Committee established very early on in its deliberations a 'working philosophy' through which the issues under its remit would be examined. In other words the way in which problems were identified and defined will be explored along with the way in which these definitions influenced decisions concerning policy recommendations.

Examples of how the law can impinge upon individual freedom will also arise. For instance, what restrictions were justifiable in limiting a person's choice as to where, when and how he drank? What were the minimum requirements of supervision to ensure an equitable balance between such individual choice and the maintenance of public order in the wider community? This provides an opportunity to examine empirically a concrete example of the philosophical debate concerning self-regarding and other regarding action outlined in Chapter 3. Much of the material in that chapter will be of relevance as

particular issues, such as the role of veto polls and the right of police entry to private clubs, come to be discussed.

In drawing this chapter to a close the 'effectiveness' of the Committee as a vehicle for formulating public policy of this nature will be assessed. The public impact of the recommendations and the transition in the policy process from Report to legislation form the basis of Chapter 6.

II. The Social and Historical Context of Drink Control in Scotland

The licensing system in Scotland came into operation at a much later period than that in England, being based on Section 10 of the Licensing Act, 1756. As far back as 1424 the Scots Parliament had passed a number of Acts dealing with the selling and consumption of alcoholic liquors, but the unsettled condition of these earlier years was not conducive to consistent observance of these laws. Indeed, down to the middle of the 18th century the smallness of the population and its distribution over widely separated and mutually inaccessible areas rendered Scottish legislation rather expressions of Parliamentary opinion than measures for effective administration.¹

When the two crowns were united in 1603 there was no assimilation of Scottish and English legislation, but on the subject of drunkenness more or less similar statutes were for a time enacted for both countries. The Scots Parliament in 1617 dealt with 'the vile and detestable vice of drunkenness daily increasing to the high dishonour of God and great harm of the whole realm' and made drunkenness and the 'haunting of taverns and alehouses after ten hours at night or at any time of the day except in time of travel or for ordinary refreshments' punishable by fine or imprisonment.²

Even after the Treaty of Union in 1707 there was still no proposal to assimilate the liquor legislation of the two countries. Acts passed in 1710 and 1716 imposing stamp duties on the granting of alehouse licences in England and Wales did not apply to Scotland. However, in 1756, the foundation of the modern Scottish licensing system was laid. Section 10 of the Act of that year provided that 'retailers of such liquors in both parts of this Kingdom should be subject to the like powers and authorities'.

By an Act of 1808 the retail of liquor in Scotland required an excise 'licence' or a justice's 'certificate' and was limited to 'common inns, alehouses, or victualling houses'. These provisions were consolidated by the 1828 Home-Drummond Act which confirmed the justices in the counties and the magistrates in the royal burghs as the authorities for granting the 'certificates', without which excise licences for inns, alehouses, and victualling houses could not be issued. Thus, the necessary machinery for licensing was set up and a form of certificate was set out with conditions attaching to the grant. Amongst the first limitations was that public drinking was not to be permitted 'during the hours of Divine Service on Sundays'.

In 1846 the increasing interest in the temperance movement in Scotland led to the appointment of a Select Committee of the House of Commons, under the chairmanship of Mr. Forbes-Mackenzie, to enquire into the granting of certificates. As a result of the Committee's Report, the Licensing (Scotland) Act of 1853, better known as the Forbes-Mackenzie Act, was passed. It separated retail liquor licences into two main classes - 'on' and 'off' - and provided that publicans should not sell groceries and that grocers should not sell liquor for on-consumption. Three forms of certificate were substituted for the existing form, viz. for hotel-keepers, for publicans, and

for grocers. Various restrictive regulations were imposed, the most important being that a licensee 'do not open his house for the sale of any liquors, or sell or give out the same on Sunday, except for the accommodation of lodgers and bona fide travellers'. The Act also made it illegal to sell or consume liquors between 11 p.m. and 8 a.m.

The law remained substantially the same until the end of the century when the 1896-9 Royal Commission on Liquor Licensing Laws examined the Scottish position. As a result of this enquiry the Licensing (Scotland) Act of 1903 was passed which gave effect to many of the recommendations made. This 1903 Act was to form the basis of the licensing code in 20th century Scotland. It repealed former statutes, but re-enacted with variations their leading provisions, re-arranging the constitution and duties of the Licensing Courts and strengthening the provisions against sale to children and young persons. Further, the Act for the first time in Scotland dealt with the 'club problem' and provided for the compulsory registration of clubs in which exciseable liquors were sold.

1913 saw, as a result of a long and vigorous political controversy, the Temperance (Scotland) Act, which gave to the localities the power of local option in respect of the issue of certificates or licences for the sale of liquor. Then, with the outbreak of war in 1914, further restrictions were introduced to regulate the hours of sale and supply in an attempt to boost the war effort. Under Government war regulations, the Central Control Board (Liquor Traffic) was empowered to restrict the sale, consumption and supply of intoxicating liquor and to limit the hours of opening of licensed premises and clubs. The purpose of this was to prevent the 'efficiency of labour from being impaired by drunkenness, alcoholism, or excess'. The historian A. J. P. Taylor has attributed the introduction of the

afternoon break to the failure at the Battle of Neuve Chappelle, after which Sir John French, to conceal his failure, complained that he had run short of shells. The Government in turn blamed the munition workers, who were alleged to draw high wages and to pass their days drinking in public houses. Consequently opening hours were restricted, and, in particular an afternoon break was imposed when drinkers had to be turned out. This, he suggests, along with Summer Time, ranked as one of the few lasting effects of the Great War on British life.³

The restrictive law originally meant to be only temporary, continued to operate in Scotland right up to the seventies. Thus, licensing law for the greater part of this century has been founded on the proposition that by restricting the opportunities to purchase and consume, the misuse of alcohol would be diminished. The law seemed to be not entirely without success when, in the late twenties and early thirties, consumption dropped and misuse was at its lowest. However, this was due as much to the poverty of that period and the effects of the great depression as to the effectiveness of the licensing laws. As poverty in its most extreme form passed and was replaced by a growing affluence and a consumer orientated society the consumption of alcohol once more increased with a corresponding increase in the problems of misuse. Since the sixties the public has spent an increasing proportion of its disposable income on alcohol with the result that consumption has risen and alcohol abuse has become one of the biggest social problems facing contemporary Scotland.⁴

The modern law relating to liquor licensing in Scotland was largely contained in two Acts - the Licensing (Scotland) Act 1959 and the Licensing (Scotland) Act 1962. The 1959 Act, which contained the basic code, was a consolidating measure which repealed and reproduced, with amendments, all the enactments relating to Scotland including the

1903 Act, the 1913 Temperance Act, the Acts of 1921 and 1949, the Licensed Premises in New Towns Act 1952, the Licensing (Seamen's Canteens) Act 1954, and various miscellaneous statutes. The Licensing (Scotland) Act 1962 was an amending measure which, in the main, implemented the recommendations of the First Report of the Guest Committee on permitted hours on weekdays and sale and supply on Sundays.⁵

The First Guest Report was published in November 1960 and recommended the continuation of the afternoon break with no substantial alteration in the extent of the permitted hours. However, with regard to the sale and supply on Sundays, it was recommended that the special provision for supply of liquor to travellers be discontinued and replaced by a system of permitted hours for hotels, public houses and licensed restaurants. The 1962 Act though, excluded public houses from its Sunday opening provisions.

A Second Guest Report appeared in 1963 relating to the constitution of licensing courts and the arrangements for granting certificates authorising the sale of liquor in areas of housing development and redevelopment.⁶ This Report did not recommend any radical changes and with one or two minor exceptions no legislative action was taken.

The Guest Committee was appointed not to review the subject of liquor licensing as a whole, but to examine the law relating to certain limited aspects of the licensing code. As a result the Committee thought it better to concentrate on the practical aspects of the problems placed before them 'rather than to attempt to evolve any philosophy which might serve as a basis for a complete reshaping of the licensing law, if that were thought to be necessary.'⁷ This compares interestingly with the approach of Clayson.

The nature of the problem in Scotland would seem to arise from the ambivalent attitudes which Scots hold towards alcohol. Studies have shown that various ethnic groups exhibit different rates of alcoholism and drinking pathologies.⁸ The attempts to explain these differences are many and varied, but one of the main explanations put forward is the cultural one. This perspective stresses the social meaning and function of alcohol, drinking and drunkenness and describes how different patterns of alcohol use have emerged in different societies. In this respect Scotland is classified as an 'ambivalent culture', where attitudes to the use of alcohol are contradictory in that there are two directly opposed value systems in relation to the use of alcohol operating in Scottish culture at the same time.⁹

On the one hand, drinking is perceived as a sign of sociability and an aid to communication at a wide variety of formal and informal events. The ability to consume large quantities of alcohol is often associated with notions of toughness and maturity. A lifestyle which involves a drinking pattern of continuous heavy consumption, particularly of spirits is sometimes seen as an indication of sophistication and urbane social mobility. On the other hand, drunkenness, though condoned if infrequent and relatively good humoured, is perceived as extremely threatening if the drunk person's unpredictable behaviour turns ugly in any way, either through direct aggression or through other forms of anti-social behaviour. Alcoholics, whether they are considered to be sinful or ill, are in either case felt to be inadequate. Thus alcohol is simultaneously approved and condemned.

The source of this confusion and the reason for the existence of two simultaneous but contradictory attitudes is that alcohol has a double identity. It is both a drug and a symbol and it is when the drug effects of alcohol are at variance with its presumed symbolic

function that problems relating to its use and abuse arise.

The myths which surround alcohol are many - myths of toughness, of maturity, of sophistication, of sexuality. These are manifestations of a set of deep-seated symbolic values which have grown and developed in Scotland over hundreds of years. However, competing against these myths has been a strong Calvinist anti-drink tradition manifest in the history of the evangelical temperance movements. These temperance leagues warned of the evils of drink and offered salvation through strict adherence to abstinence, Protestantism, the Sabbath and the Scottish family way of life. One teetotal eyewitness at Arthur's Seat in Victorian Edinburgh described how 'on May Morning ... the sun rises to shed its light on a scene of swearing and depravity ... Nothing prevails but disorder and dissipation and shouts of laughter, caused by the floundering of someone more drunken than his fellows; and one would almost imagine the assembled crowd were there like a company of heathens, to worship the sun through drunkenness'.¹⁰ Another temperance advocate, and a doctor, was so appalled by the extent of drunkenness at the end of the 19th century that she wrote, 'I scarcely know of any other physical condition, excepting insanity and hydrophobia, at which the individual or the public need be so truly and properly alarmed'.¹¹

The output of Victorian temperance literature was prolific and its range remarkable. An 1880 temperance history could list more than 200 periodicals from 'The Abstainers' Journal', published in Edinburgh, to 'The York Temperance Visitor', as well as nearly 900 books and pamphlets. Titles of the period included 'An Earnest Appeal from the Furnace by a Bottle Hand to his Fellow Workmen' (1856), 'Temperance in the Hay and Harvest Field' (1892), 'Country Walks and Temperance Talks' (1901) and the wonderful 'Tippling and Temperance' (1890).

This delightful tract was 'a treatise in 1,289 words each commencing with the letter T'. 'Thoughtless thousands turn to the too tempting tap', it began. 'Thriving tradesmen taste tippie timidly ... time-wasters tippie tremendously ... thereby turpitude thrives, turmoil triumphs'. Worst of all was 'the trivial, time-serving toss-pot' who became a 'truculent tyrant throwing toast, tea-cake ... table-knives, tea-cups ... trays, tongs, then tearing the table-cloth', all in marked contrast to the behaviour of the 'tolerant temperance theorist'.¹²

The 'father of temperance societies in Great Britain' was said to be John Dunlop, a Greenock magistrate and anti-usage campaigner. Another prominent figure was William Collins, a printer and publisher, who founded the Scottish Temperance League. Temperance took root in Scotland around 1830 and during the first year some 130 societies had been formed, with a total membership of 25,000 including many clergy who were active in helping the cause. From Scotland it spread south - an example of 19th century 'cultural emigration'. Harrison has recorded:

'Scotsmen established the anti-spirits movement in England. Scottish temperance zeal for many years burned more brightly than English enthusiasm, and the Scottish religious atmosphere closely resembled that of New England, where the American temperance movement was born. Rich countries easily attract intellect and energy from nearby poor countries, and the temperance movement assisted the process. Scotsmen in fact helped to prepare the very ground in which the early anti-spirits movement took root, for evangelicalism itself owed much to the eighteenth century diaspora of devout Scottish Presbyterians'.¹³

Here then is another aspect of Scotland's 'cultural neurosis'. A history of ambivalent attitudes towards the use of alcohol has led to a disproportionately high incidence of alcohol-related problems in modern Scotland. A number of reasons can be advanced to explain

why drinking should play such a disproportionately important part in the cultural life of Scotland. The Scottish Health Education Unit suggest that alcohol consumption rates tend to be particularly high where there is a) social pressure to imbibe; b) inconsistent or non-existent social sanctions against excessive drinking; c) drinking outside a family or religious setting; and d) ambivalence towards moderate drinking. They comment:

'All these conditions are fulfilled in Scotland today. When they are viewed in the context of a rigorously enforced protestant ethic, a fierce and sometimes embittered patriotism and a comparatively inimical climate, it is easy to see how the functional aspects of drinking behaviour have become inextricably tangled with a host of compensatory and guilt provoking feelings. These have acquired separate symbolic associations and have served to make drinking an activity qualitatively of considerable importance to the self-esteem of the individual and of the nation'.¹⁴

Drinking and problem drinking in Scotland has been the subject of an enquiry by Martin Plant.¹⁵ Drawing upon his own research as well as several related studies, Plant offers some interesting insights into a complex area. This more recent evidence will be considered here before discussing the evidence which was available to Clayson in the early seventies.

Wilson's study of drinking habits in the United Kingdom compares consumption in Scotland, Northern Ireland, and England and Wales.¹⁶ Table 5.1 shows average alcohol consumption in the UK by sex. The most striking conclusion was that drinking habits in Scotland were almost indistinguishable from those in England and Wales. Wilson's survey revealed that 6% of men in England, Wales and Scotland and 3% of those in Northern Ireland reported having drunk 51 units or more in the previous week. This is the equivalent of 25½ pints of beer or 51 single glasses of spirits or wines. The heaviest drinkers were young adults

TABLE 5.1 Average Alcohol Consumption in the United Kingdom
by sex.

Country	Average previous week's alcohol consumption*	
	Males aged 20 or over	Females aged 20 or over
England and Wales	19.6	7.0
Scotland	19.5	6.2
Northern Ireland	14.5	6.5

*These are standard units, which are equivalent to $\frac{1}{2}$ pint of beer,
1/6 gill of spirits (an English single), a glass of wine (4 fl. oz.)
or a small glass of fortified wine (2 fl. oz.).

This table relates only to drinkers.

Source: Wilson (1980)

as cited in Plant (1982) p. 105.

aged 20-27. Results showed though, that in Scotland males aged 28-37 consumed almost as much as those aged 20-27 which lends support to the view that in Scotland youthful levels of relatively heavy drinking persist rather longer than they do south of the border. This, postulates Plant, might be one explanation for the particularly high levels of alcohol problems in Scotland.

Another factor which might go some way to explain national variations in the levels of alcohol problems is the pattern of drinking. Males in Scotland reported that on average they had only 3.0 drinking days in the previous week while those in England and Wales had 3.6. Similarly, females in Scotland had an average of 2.1 drinking days, while those in England and Wales had 2.7. Plant comments that these variations could mean that in Scotland drunkenness is a more commonplace consequence, since alcohol consumption is concentrated into fewer days. This heavy drinking (defined by Wilson's survey as drinking four pints of beer or equivalent in one day) took place mainly at the weekend (Friday to Sunday) when 38% of Scottish male drinkers had drunk heavily on one day, compared with 25% of male drinkers in England and Wales. Plant remarks:

'This important study suggests that the traditional view that drinking in England and Wales is more moderate than in ... Scotland is to some extent justified... The survey ... lends support to the view that the main reason why Scottish alcohol problems are more commonplace than those in England and Wales is the *pattern* rather than the total general level of alcohol consumption'.¹⁷
(original emphasis).

It is commonly accepted that excessive alcohol consumption plays a direct role in the development of liver damage and death from cirrhosis of the liver. Table 5.2 shows the number and rate of deaths from liver cirrhosis per 100,000 in the United Kingdom between 1970 and 1979. The figures indicate that between these years deaths from

TABLE 5.2 Number and Rate of Deaths from Cirrhosis of the Liver,
per 100,000 Population in the United Kingdom (1970-79).

Year	U.K.		England and Wales		Scotland		Northern Ireland	
	N	Rate	N	Rate	N	Rate	N	Rate
1970	1,671	3.0	1,392	2.8	239	4.6	39	2.5
1971	1,836	3.3	1,570	3.2	219	4.2	47	3.0
1972	1,976	3.5	1,662	3.4	258	5.0	56	3.6
1973	2,134	3.8	1,804	3.7	264	5.1	66	4.3
1974	2,149	3.8	1,754	3.6	328	6.3	67	4.3
1975	2,208	3.9	1,835	3.7	309	5.9	64	4.1
1976	2,289	4.1	1,890	3.8	319	6.1	80	5.2
1977	2,220	3.9	1,820	3.7	336	6.5	64	4.2
1978	2,364	4.2	1,926	3.9	382	7.4	56	3.6
1979	2,616	4.7	2,185	4.4	431	8.3	-	

Source: Annual Abstract of Statistics (1975; 1981)

as cited in Plant (1982) p. 117.

liver cirrhosis in the UK increased by 56%. The table also reveals that the rate of deaths from liver cirrhosis was consistently higher in Scotland than in the rest of the UK.

Mortality data, however, indicate only the number of excessive drinkers in a population who have died. In order to estimate the number of excessive drinkers who are living one must turn to other data sources. One of these is hospital and psychiatric admissions for alcohol related problems.

Notwithstanding the problems inherent in the collection of such data (e.g. diagnostic categories can be insufficiently specific with an element of approximation entering into the classification of a particular condition as alcohol-related), official statistics on admissions to psychiatric hospitals for alcoholism and alcoholic psychosis reveal some remarkable differences between Scotland and England and Wales.

Table 5.3 shows total admissions to psychiatric hospitals for alcoholism and alcoholic psychosis in Great Britain between 1970 and 1977. Since these figures are total admissions (i.e. first admissions and readmissions) they record events and not people. What they indicate, however, is that admissions for alcoholism and alcoholic psychosis represent a much larger proportion of total psychiatric admissions in Scotland (21% in 1977) than in England and Wales (6.8%).

Table 5.4 illustrates first admissions to psychiatric hospitals for alcoholism and alcoholic psychosis in Great Britain between 1970 and 1977. Since these figures represent people rather than events they can be expressed as a rate per 100,000 population. It can be seen that the rate of first admissions is considerably higher in Scotland (40.8 per 100,000 population in 1977) than in England and Wales (8.3 per 100,000), which further confirms that known alcohol

TABLE 5.3 All Admissions to Psychiatric Hospitals for Alcoholism and Alcoholic Psychosis, Great Britain (1970-77).

Year	Great Britain		England and Wales		Scotland	
	No.	Rate per total admissions all diagnoses %	No.	Rate per total admissions all diagnoses %	No.	Rate per total admissions all diagnoses %
1970	10,570	5.1	7,279	4.0	3,291	15.0
1971	11,922	5.8	8,306	4.8	3,616	15.9
1972	13,568	6.5	9,287	5.0	4,281	17.2
1973	15,591	7.4	10,590	5.7	5,001	19.8
1974	16,915	8.2	11,498	6.3	5,417	21.4
1975	17,320	8.2	11,827	6.4	5,493	21.6
1976	18,087	8.4	12,700	6.7	5,387	20.6
1977	18,355	8.5	13,058	6.8	5,297	21.0
1977/70		+74%		+79%		+61%

Source: Health and Personal Social Service Statistics for England;
Health and Personal Social Service Statistics for Wales;
Scottish Health Statistics.

as cited in Plant (1982) p. 124.

TABLE 5.4 First Admissions to Psychiatric Hospitals for
Alcoholism and Alcoholic Psychosis,
Great Britain (1970-77) .

Year	Great Britain		England and Wales		Scotland	
	Number	Rate per 100,000 population	Number	Rate per 100,000 population	Number	Rate per 100,000 population
1970	3,520	6.5	2,250	4.6	1,270	24.4
1971	3,999	7.4	2,550	5.2	1,449	27.8
1972	4,409	8.1	2,788	5.7	1,621	31.1
1973	5,293	9.7	3,345	6.8	1,948	37.4
1974	6,015	11.1	3,654	7.4	2,361	45.2
1975	5,844	10.7	3,721	7.6	2,123	40.8
1976	5,880	10.8	3,883	7.9	1,997	38.4
1977	6,203	11.4	4,085	8.3	2,118	40.8
1977/70		75%		80%		67%

Source: Health and Personal Social Statistics for England;
Health and Personal Social Statistics for Wales;
Scottish Health Statistics.

as cited in Plant (1982) p. 125

problems are greater in Scotland than in the rest of Britain.

However, even before such evidence was readily available demands for change in the licensing laws existed. In the late sixties there was dissatisfaction with the way the law was operating. Restricting the opportunities to purchase and consume had failed to have its desired effect. The Scottish Law Commission, for instance, drew the attention of the Scottish Home and Health Department to the large number of proposals being put forward in connection with the licensing laws and urged that a review of the Licensing Acts should not be too long delayed. Also there was mounting commercial pressure from the licensing trade, consumer groups and tourist organisations for a more relaxed approach to licensing hours. While the line was taken that a more liberal approach would ease the social pressure to drink excessively in a short period, the possibility of increased trading opportunities and hence increased profits was not lost on these commercial concerns. Generally though, pressure for reform was diffuse being spread across disparate sections of the community rather than concentrated in any one campaign or pressure group.

It was the opinion of one senior executive of a major brewery that a desire for a change in the licensing laws had been building steadily throughout the post-war years.¹⁸ He said that although the Guest Report had made some good recommendations, the 1962 Act had left too many anomalies, especially with regard to hotel licences and veto polls. He indicated that the Brewers had not been a leading pressure to get Clayson established, but when Clayson was eventually set up they were 'of course, delighted'. Most of the early pressure he said had come from the tourist authorities, and indeed this was acknowledged in the introduction of the Clayson Report.¹⁹ The period following the 1969 Monopolies Commission Report²⁰ on the supply of beer 'was marked by a

significant increase in pressure for relaxation of licensing law, particularly by tourist and consumer organisations, and there was evidence of more general dissatisfaction'.²¹

This 'general dissatisfaction', according to Mr. Alick Buchanan-Smith, a Parliamentary Under-Secretary in the Scottish Office at the time of the Clayson Committee's appointment, was expressed by two broad schools of thought. The first, which he labelled the 'temperance lobby', thought the answer to alcohol abuse lay in even more restriction on its availability. The second, which he referred to as 'social reformers', believed the licensing laws to be far too strict and favoured a relaxation in an attempt to encourage a more responsible attitude. He remarked:

'it was not so much a matter of individual pressure groups lobbying for reform, more a case of a climate of opinion desiring change. A lot of people, both within the Scottish Office and in the Scottish community generally, were extremely worried about serious alcohol abuse in Scotland'.²²

In response to mounting dissatisfaction with the licensing laws, particularly in relation to tourism, it was announced on 8th December 1970 that committees of inquiry would be set up. In a written Commons answer, the Home Secretary, Reginald Maudling, stated that he had decided to appoint a committee of inquiry to review the law on liquor licensing in England and Wales which 'was archaic and in need of thorough overhaul to meet modern conditions'.²³ At exactly the same time, Gordon Campbell, the Secretary of State for Scotland, announced that a Scottish committee of inquiry would be established as he had 'decided that it would be appropriate to have a general review of the licensing law of Scotland'.²⁴

While each committee was autonomous a 'close liaison' was maintained between the committees through the Chairmen and Secretariat

in an attempt to minimise the differences in any proposals for the two countries. As the introduction to the Clayson Report stated:

'While the prime aim of each committee was to consider the requirements of our respective countries and to frame recommendations accordingly, we kept in mind the desirability of narrowing these differences in law as far as possible....(O)n a matter such as this it is perhaps too much to expect unanimity, but such divergence as exists ... can be ascribed in the main to genuine differences in circumstances and public attitudes in the respective countries'.²⁵

The Clayson Committee was of the 'matching' type. It duplicated the work of an English committee north of the border. However, it was independent in its appointment and operation and this autonomy allowed the Committee to address itself to the issues as they appeared in a specific Scottish context. In this respect the Clayson Committee demonstrated the way in which the Scottish 'system' could function independently when dealing with activities which acted solely on the population of Scotland. Yet on the other hand, it also reflected a desire not to diverge too far from the norms of the rest of the country if the general desire for equality before the law was to be satisfied.

III. Appointing the Committee

One of the principal considerations in setting up a committee of inquiry is achieving a balanced membership. Interests tend to be balanced against each other in order to represent 'a good cross-section of the community'. This can present something of a dilemma for the appointing department. The department will want to appoint and be seen to be appointing, individuals of recognised ability and experience, yet at the same time a minister and his officials will try to ensure that the committee personnel reflect, to some extent, their own beliefs and expectations. Donnison has written that in

the selection of personal talent 'Whitehall is politically sophisticated, but alarmingly ignorant about people'.²⁶ The Scottish Office, however, does not seem to be as susceptible to this line of criticism since knowledge of the range of suitable talent is more extensive given the more compact nature of Scottish society.²⁷ Often a considerable number of potential candidates are known personally at St. Andrew's House because of their professional position and standing in the community.

Of the Clayson Committee members spoken to all praised the sensitivity with which St. Andrew's House handled the selection. There had been an effort on the part of the Scottish Office to avoid extremes. Both the Brewers and the Church were excluded from the Committee on the grounds that their positions were so diametrically opposed and entrenched as to render debate sterile. Mr. Menzies Campbell, for instance, commented that there had been 'a strenuous effort to find a group of people with no special interest in licensing'.²⁸ He said the approach had been to appoint people who would be 'enthusiastic and sensible' in their attitude to the problems at hand and who would not slow down the work of the Committee by dogmatically arguing one particular line. The Chairman, Dr. Christopher Clayson, also remarked that 'it was deliberate policy not to have the Church represented on the Scottish Committee, even although the Errol Committee had a Bishop'.²⁹ Similarly, Dr. John Sutherland indicated that no Church representative was included on the Committee because 'the Church of Scotland tended to take too moralistic a view on the issue'. He added, 'the aim of the Scottish Office was to try to get together a committee that would work. Senior civil servants were very careful in their selection of members'.³⁰

This attitude of the Scottish Office was confirmed by a Minister of that period, Mr. Alick Buchanan-Smith, when he remarked that 'there was a willingness to approach the problem in a practical way'. The Clayson Committee had been 'a committee of real workers representing a good cross section of the community, whereas one of the failings of the Errol Committee was that it had been a bit too high powered'.³¹

It is interesting to note that the Committee was considered 'a good cross-section of the community' by Buchanan-Smith. A more accurate description might be 'a good cross-section of the *professional* community', since, as Table 5.5 shows, Committee members were drawn from an elite group of well-placed Scottish citizens. This illustrates the point made by Chris Allen concerning the 'exclusiveness' of Scottish Office activities discussed in Chapter 1. The members of the Clayson Committee held positions as academics, doctors, lawyers, local government officials and the like. This 'exclusiveness' also tended to work against women who were under-represented, being reduced virtually to a residual category. Only Menzies Campbell was to mention that he thought there was a good case for having more women on the Committee.

T. J. Cartwright, in his research on Royal Commissions and Departmental Committees, has classified committees into three different types - impartial, expert or representative.³² The 'representative' type, characterised by a pattern of membership which reflects two or more counter-balanced interests, was deliberately avoided in the case of the Clayson Committee. Nor can the Committee accurately be described as 'expert' in that none of the members were selected for their special knowledge of licensing matters. This leaves the 'impartial' type as the closest approximation of the Clayson Committee. The expertise that members possessed encompassed a broad range of

TABLE 5.5 Members of the Departmental Committee on
Scottish Licensing Law

Dr. C. W. Clayson (Chairman)	Physician
Mr. W. M. Campbell	Advocate
Mr. James F. Falconer	Town Clerk of Glasgow
Miss Morag C. Faulds	Director of Social Work
Mr. E. Frizzell	Chief Constable (Stirlingshire)
Mr. A. W. Hardie	Senior Administrative Officer of Irvine New Town
Prof. T. L. Johnston	Professor of Economics, Heriot-Watt University
Mr. John Kerr	Journalist and broadcaster
Mr. Maitland Mackie	Farmer; Chairman of Aberdeen- shire County Council
Mr. Ben Smith	Trade Union Official
Dr. J. D. Sutherland	Psychiatrist
Mrs. A. S. Thom	Community worker.

professional skills, but of greater importance was their ability to take an informed yet common sense view of the problem.³³ Cartwright has remarked on this:

'Impartial committees are composed of members who cannot be said to have more than an average interest in and knowledge of the subject matter under study by the committee ... It is not always easy, of course, to make these distinctions, to assess whether a particular person does have special interests or expert knowledge - to say nothing of whether he was appointed because of it rather than for some other reason'.³⁴

These difficulties are not simply difficulties of academic analysis for they can impinge upon the perceptions that individual members hold with regard to their own role on the committee, and in so doing can influence the whole tone and direction of a committee's activities.

The choice of chairman was particularly important since a good chairman can more or less organise and orchestrate a committee. Appointing departments therefore tend to look for experience on previous committees. Dr. Clayson had experience of several. He suggested that there were probably two main reasons for his appointment. Firstly, since medical considerations were involved it was probably felt that a doctor would be preferable to a lawyer; and secondly, as he had just retired it would be known that he would have the spare time to do the job. To these a third might be added, and that was Dr. Clayson's recognised ability to resolve disputes and build a consensus.

The appointment of the Clayson Committee then, was fairly typical corresponding to most of the internal rules set by bureaucrats for such practices. There would seem to be little difference in the criteria adopted by the Scottish Office and other government departments in their selection of personnel. However, Scottish Office appointments to committees of inquiry are drawn from a relatively small, elite, and close-knit Scottish political community in which the

participants are often personally known to each other, and this tends to reinforce the 'exclusiveness' prevalent in the Scottish Office's centralised 'administrative style'. On the other hand, such familiarity can facilitate some astute appointments.

IV. The Approach of the Committee: It s 'Philosophy'

The Departmental Committee on Scottish Licensing Law was given the following terms of reference:

'To review the liquor licensing laws of Scotland and to make recommendations on what changes, if any, might be made in the public interest; and to report'.³⁵

This mandate was sufficiently broad to allow an investigation into the whole field of liquor licensing law in Scotland, the first comprehensive review for more than 40 years. To this end the Committee sat in private for almost 2½ years, holding some 39 full day meetings at which both written and oral evidence was considered. In its method the Committee adopted a standard approach, inviting a number of specific organisations to submit written evidence, as well as issuing a general invitation through the press to the public and any interested parties to contribute. Some of the invited organisations were asked only to comment to particular aspects of the remit, while others were asked for their views on the basic issues involved and the main practical questions arising from them. The response to the invitations was considerable, with a total of about 250 written submissions being received. In addition, the Committee heard oral evidence from almost 50 organisations.

Information was also obtained from a survey conducted by the Office of Population Censuses and Surveys into public attitudes to the licensing law in Scotland. (The equivalent OPCS survey for

England and Wales was made available to the Errol Committee.) Both Clayson and Errol, however, expressed reservations about the survey, commenting that the data had 'to be treated with some care'.³⁶

The survey found that the vast majority of people in Scotland (88%) drank alcoholic liquor at least occasionally. Among men the proportion was 96% and among women 83%. 95% of the 18-34 age group drank occasionally, while 87% of 35-64 year olds and 73% of the over 65s did so. As regards the places in which people drank, almost 60% of the adult population in Scotland had a drink in a public house at least occasionally, while a similar proportion did so in a hotel or restaurant. 75% of those interviewed had an occasional drink at home. Regular drinking (for the purpose of the survey, once a month or more often) in a public house was reported by 36%; in the home by 35%; in a club by 22%; in a hotel by 18%; and in a restaurant by 16%. The survey confirmed that regular pub going was predominantly a male activity, and a youthful one.

Information was also provided on the attitude of people in Scotland towards pubs and the facilities they expected to find in them. In response to a series of statements, 38% would not from choice go into a pub; 33% of men would not wish to take their wife (if they had one) into a pub; and 92% of women would not go into a pub alone. On the other hand 50% felt that pubs were warm, friendly places and almost a quarter felt at home in a pub and thought it an ideal place for a night out. Virtually all favoured proper toilet and washing facilities. There was also a substantial demand for sandwiches, rolls and cold snacks, and to a lesser degree, for hot snacks, while more than a half wanted tea and coffee to be available. About a half of informants wanted a playroom or play-garden, suggesting some desire for keeping the family together while adults were drinking.

The survey also tried to establish the views of the public on particular provisions in the licensing law. However, the Clayson Report expressed a number of reservations about the findings, suggesting that public interest in licensing law itself was low; that the survey demanded snap judgements on complicated issues ideally requiring considerable thought; that the answers tended to be inconsistent; and that public attitudes on such matters were liable to alter.

Notwithstanding these qualifications, the findings revealed some interesting attitudes. 48% of those interviewed in Scotland felt that in general the existing restrictions on the sale of alcohol were 'about right', while 23% felt that they were not restricted enough, and 19% felt that they were too restricted. On the hours of opening in pubs opinion was divided equally (about one-third in each case), among those in favour of all-day opening and those who favoured existing arrangements. Opinion was also fairly evenly divided on closing time, 40% being satisfied with 10 p.m., and 42% in favour of a later closing hour. As regards Sunday opening of pubs in Scotland, 48% were in favour and 50% against. While there was relatively little support for allowing children into the bars of public houses, there was a good deal of support for the separate idea of a place where the whole family could obtain refreshment. Nearly all (98%) informants thought there should be a minimum age at which young people were allowed to drink on their own in licensed premises, 81% considering that the age should be at least 18.

The data gathered by the OPCS survey was utilised by the Committee with a measure of caution. By the time the Report came out the findings had dated by two and a half years. However, the Committee was forced to accept that it was 'the best evidence available to us on the attitudes and wishes of the consumer'.³⁷

Statistical information was obtained from government sources. The only official figures available relating to the total consumption of alcohol were those maintained by the Commissioners of Customs and Excise for beer, wine and spirits (home-produced or imported) which were retained for home consumption. These statistics were maintained on a UK basis and therefore there was no breakdown for Scotland. Since figures for Scottish consumption were not available from any other source the Committee had to rely upon observations on the responsiveness of consumption to changes in taxation and on more general large-scale trends (e.g. Family Expenditure Survey statistics). However, statistics concerning the number of premises for which certificates were granted for the sale of alcohol were more readily obtainable, being published annually in the volumes of Civil Judicial Statistics for Scotland. From these figures it was possible to build up a picture of the changing pattern of retail outlets in Scotland over the years.

Thus, in its *modus operandi* the Clayson Committee corresponded, by and large, to a 'typical' departmental committee. However, while there may have been nothing unusual in its procedure what was a distinguishing feature of this committee was its enlightened, almost philosophical, approach to its subject. It did not, to paraphrase Shonfield's expression, 'just plunge into its subject and collect facts, but developed from a very early stage definite theoretical assumptions not only about the issue under investigation, but also about its own role in policy formulation'.³⁸ It did not confine itself to examining the technicalities of the licensing laws, but took the opportunity systematically to scrutinise the principles and philosophy that lay behind those laws.

Utilising the statistical information made available to it, the Committee's initial task, according to some of its members, was to establish 'correct objectives'. It was immediately apparent, remarked Dr. John Sutherland, that 'a working philosophy was needed'. Similarly, Mr. Menzies Campbell indicated that 'it was plain from the first meeting that changes were on the cards. The underlying theme of reform was obvious from the outset. There was going to be no tinkering - it was going to be a root and branch alteration'.³⁹

The Committee's approach was developed from a tripartite analysis of the controls available for the prevention of misuse. These were categorised as:

- i. Social controls, that is controls which derive from the attitudes of a society, and its practices in relation to the consumption of alcohol.
- ii. Fiscal controls, that is taxation, whether for revenue-raising or social purposes, and its effects on alcohol consumption.
- iii. Legislative controls, that is restrictions imposed by law on the sale and consumption of alcohol.

These controls were not three separate forms of restriction; rather they were interactive. Since fiscal controls were identical in Scotland and in England and Wales, and the similarities in the licensing laws were greater than the differences, the Committee looked for an explanation of the greater misuse of alcohol in Scotland in the range of social controls.

Earlier it was noted that one of the main explanations that has been advanced for the high incidence of alcohol-related problems in Scotland is the cultural one. It was suggested that the strong polarity of views which prevails within Scotland blurs the distinctions

between socially acceptable and socially unacceptable drinking behaviour. While the Clayson Report was at pains to avoid an oversimplified analysis of the problem it was significant that the Committee drew upon American research from the Co-operative Commission on the Study of Alcoholism which emphasised that strong and conflicting attitudes towards alcohol within a society were an obstacle to the reduction of alcohol misuse.⁴⁰ Drawing from this research and from the results of the OPCS survey, the Clayson Report was led to comment:

'... in present Scottish circumstances it is in the area of social controls over drinking practice that improvement is most required if the serious problem of alcohol misuse is to be ameliorated'.⁴¹

Fiscal controls involving rates of alcohol taxation were also thought to play a part in preventing alcohol misuse by setting the cost of drink. Drawing upon Canadian studies at the Addiction Research Foundation of Ontario the Committee quoted findings which suggested that there was in general terms an inverse relationship between the cost of alcohol to the consumer (i.e. cost per quantity of pure alcohol) and the extent of harmful consequences of alcohol misuse. The Committee was of the opinion, however, that this inverse relationship did not in itself justify increased taxation. The relevance of the finding was limited to the Report noting that the extent of the alcohol problem in Scotland, serious though it was, was in fact restricted by the high rate of taxation, and that in deciding future rates of alcohol taxation weight should be given to the substantial part it played in alcohol control.

Subsequent research has lent some support to Clayson's thinking on this issue. Professor Brendan Walsh has found that increasing the cost of drink does not in itself dramatically reduce misuse.⁴² His

study of Irish drinking suggested that prohibitive expense deterred moderate drinkers, but not heavy drinkers who merely allocated an increased proportion of their income, whether they could afford it or not, towards obtaining drink.

Perhaps one of the most dramatic illustrations of the relationship between cost and consumption has been published by the Scottish Health Education Unit in 1976.⁴³ Table 5.6 plots the per capita consumption of whisky throughout the UK against the price of a standard bottle, expressed as a percentage of disposable income, (personal disposable income is what is left after deduction of taxes and statutory contributions). As the cost decreases so consumption increases Table 5.7 then shows the changes in consumption of whisky and its relative cost in the UK from 1950-70 together with the rate of admission to Scottish hospitals since 1956.

The SHE Unit comment:

'It is difficult to ignore the similarity of the curves illustrating consumption and hospital admission, as opposed to the converse curve illustrating cost. Obviously, this is not a simple case of cause and effect. Many other factors will influence the situation. At the same time, however, it is clear that as the individual pays less for his bottle of whisky, so the total cost to society increases in terms of alcoholism and all the human suffering that accompanies it'.⁴⁴

This report was brought out in 1976 and as the decade progressed more evidence was gathered and published (for example by Plant) showing the links between price, consumption and alcohol problems. Much of this evidence suggested that the price of alcohol be raised or at least maintained in real terms. However, only some of this evidence was available to the Clayson Committee in the early 1970s and its task was to link existing data on price and consumption with data about the effects of control through licensing.

TABLE 5.6

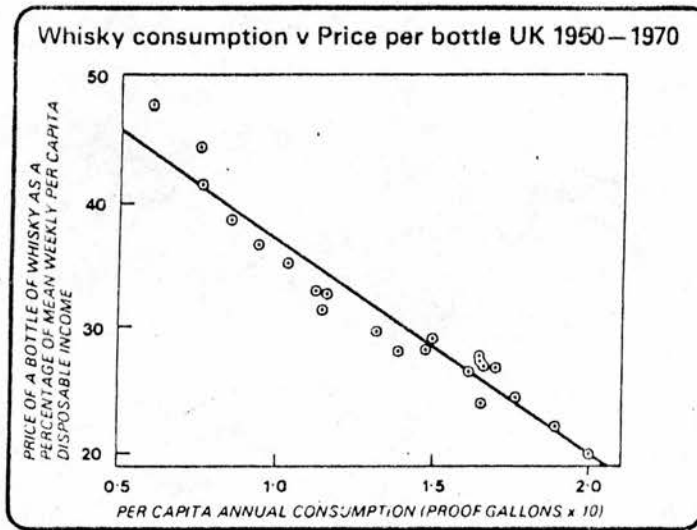
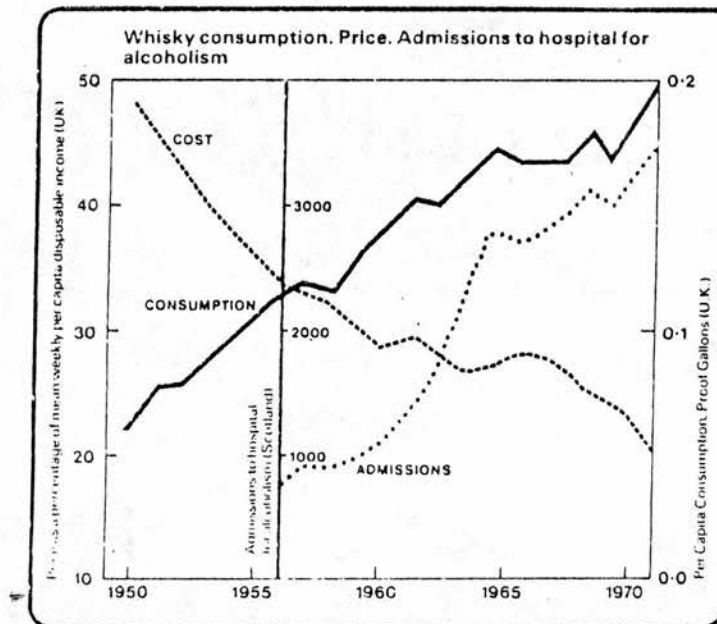


TABLE 5.7



Source: Scottish Health Education Unit, Understanding Alcohol and Alcoholism in Scotland, HMSO, 1976.

Thus, the third part of Clayson's analysis concerned legislative controls. This for the most part involved licensing, but legislative control of production and of advertising, were other forms of this type of control. The basic premise of licensing was that it limited the availability of alcohol through limiting the number of places it could be purchased, the number of places it could be consumed, and the number of hours it could be so obtained and consumed, and in so doing levels of consumption and therefore rates of misuse could be controlled. However, the Clayson Committee raised doubts concerning the effectiveness of the licensing laws, questioning whether consumption was restricted by this means. Yet what effect a relaxation in the licensing laws would have on consumption was not clear. Nevertheless, after weighing up the possible advantages and disadvantages, the Committee decided, on balance, that a relaxation was desirable provided that any resulting increase in consumption as a result of the relaxation was not of significant proportions. The Report argued:

'Licensing, a negative and restrictive process, can play only a strictly limited part in the control of alcohol misuse. The part should be that of strengthening social control by helping in the formation of public attitudes to alcohol and modifications of practices in its consumption.'⁴⁵

In reaching this decision the Clayson Committee did not receive much assistance from the medical profession which remained equivocal as to the effect of the licensing laws on the misuse of alcohol. The Scottish Council of the British Medical Association could not substantiate an opinion 'in view of the unexpected lack of medical documentation on the effect of licensing laws'.⁴⁶ The Institute of Psychiatry was the same. They commented:

'The extent of any adverse health impact which might result from an increase in sales outlets or an alteration in type of outlet available is quite

uncertain. Present evidence really doesn't allow even an informed guess as to the likely consequence. It may be noted in parenthesis that there is similar uncertainty as to the probable effect of licensing hours'.⁴⁷

Similarly, the Royal College of Physicians and Surgeons of Glasgow considered there to be insufficient evidence relating to the effect of the law on the pattern of alcoholism and therefore could not predict with accuracy what would happen if such laws were changed. This was echoed by their counterparts, the Royal College of Physicians of Edinburgh, which could not find reliable information either. They remarked that it was 'not possible from existing knowledge to predict with confidence the effect on health of alterations in the licensing laws'.⁴⁸

However, all the medical bodies were of the opinion that some external control of drinking should be continued. They all concurred that the available evidence suggested that problem drinking and alcoholism increased as alcohol became more available. By limiting sale, the state was attempting to reconcile opposing responsibilities - to allow citizens to drink, and at the same time to control the availability of drink to those who misused it, and endangered themselves and others. Therefore, in part at least, licensing controls were intended to protect public health. And since external controls for the protection of the public were accepted in other spheres of society, for example speed limits, medical opinion thought them to be necessary also with regard to alcohol use - although it felt unable to comment on the nature and extent of those controls.

The Clayson Committee's approach was based on a fundamental scepticism that restriction of the availability of alcohol in itself could control alcohol misuse. Careful consideration was taken of the serious problem which existed in Scotland concerning the misuse of

alcohol and weight was attached to this factor in the Committee's deliberations. However, as well as giving due regard to the part licensing could play in controlling the problems of alcohol misuse, the Committee also took into consideration the fact that a majority of people in Scotland who consumed alcoholic drink did so in reasonable moderation and without harmful medical or social consequences. The Committee thus developed an approach which sought to balance recommendations that would be of benefit to the majority of consumers, without however, exacerbating the existing problems of the minority. The commitment was not only to take into consideration the circumstances which prevailed at the time, but also 'to anticipate the likely development of work and leisure patterns and consumer needs over the next 20 years'.⁴⁹

V. Comparative Developments in England: The Errol Committee

The Errol Committee was appointed by Home Secretary Reginald Maudling in April 1971 to review liquor licensing law in England and Wales. It based this review, as Clayson did, on the proposition that a licensing system was a necessary control since intoxicating liquor could not be sold or supplied without some form of prior permission. As noted earlier, English licensing law differed from that operating north of the border. The licensing system in England and Wales was based on local licensing justices who had complete discretion to grant or refuse a licence of which five basic types existed - a full 'on'-licence, an 'off'-licence, a restaurant licence, a residential licence, and a combined residential and restaurant licence. The permitted hours were 11 a.m. to 3 p.m. and 5.30 p.m. to 10.30 p.m. (11 p.m. in some areas where justices permitted). Sunday opening was from 12 noon to 2 p.m. and 7 p.m. to 10.30 p.m. Extensions could be granted and these

were of three types - a supper hour which allowed an extra hour in restaurants; an extended hours order until 1 a.m. for establishments providing meals *and* music; and a special hours certificate until 2 a.m. for premises holding a public music and dancing licence.

Clubs were divided into two types - 'proprietary' and 'members'. A proprietary club required a licence but a members club required only a certificate of registration from the magistrates court as alcohol was deemed to be 'supplied' rather than 'sold' in such premises.

Children had to be over 14 to gain access to licensed premises and, generally speaking, over 18 to buy and consume drink in a bar.

Errol took the view that licensing law should concern itself with physical standards and conduct of premises; character of licensees; ages for access, purchase and consumption, and hours of opening. The main recommendations of the Report were in these areas. The Report suggested that licensing justices should continue to be responsible for the grant of a liquor licence and for other functions arising out of licensing legislation but recommended that licensing justices' absolute discretion be replaced by specified grounds on which applications for grant and renewal of licence could be refused. Further, two types of licence were recommended - one personal to the proprietor of the premises (a personal licence) and one held by the owner (a premises licence). Existing licences were to be amalgamated into one single form of premises licence - any differences in the types of outlet regarding the nature of the premises or the nature of the liquor allowed to be sold was to be specified in the conditions of the licence. All clubs were to be licensed and police were to have a general right of entry. Recommended permitted hours were to be from 10 a.m. until 12 midnight with the proviso that licensing justices have the power to close premises for a specified period of time if

this was felt to be in the public interest. Off-licences were to be open from 8.30 to 12 midnight and places of public entertainment were to be exempted from permitted hours but other forms of control were to apply such as a certificate to sell liquor as an ancillary to the main purpose for which the premises were licensed. The Report also recommended that children under 14 be allowed access to certain parts of suitable premises and that the age limit for purchase and consumption be reduced from 18 to 17. The remaining Sections of this chapter will consider in what ways and for what reasons the recommendations of the Clayson Committee differed from these proposals.

VI. The Main Issues and the Nature of the Arguments

The remit of the Clayson Committee, as noted earlier, was such that it was empowered to undertake a comprehensive review of the whole sphere of licensing law. Thus, as well as dealing with those issues which most attracted the public eye, viz. where and when the ordinary consumer could and could not drink, the Committee also dealt with a wide variety of other issues. A brief review of the issues and the arguments about them will be of benefit before proceeding to analyse the role of pressure groups in the policy process. The most systematic approach to this is to adopt the categorisation utilised by Clayson.

a) The licensing authority. Here, the structure of the new licensing authority was important since it would be through this body that the licensing laws would be implemented. Of concern was the form the authority should take in light of two main considerations: i) impending local government reform, and ii) the principles by which licensing should operate. The questions were at what level in the new two tier system of local government licensing should fit, and whether it should

be an 'administrative' or a 'judicial' function.

b) The types of licences. The sale of alcohol is carefully controlled through a system of certificates giving suitable licensees the authority to sell liquor in specified premises. At issue was the adequacy of the existing types of certificate and the discretion by which they were granted. The reform of certain types of certificate, it was felt, could have an effect on changing patterns of consumption.

c) Hours of sale and supply. This was the issue which attracted most public attention. The main topic of controversy concerned, on the one hand, the relationship between licensing law, levels of consumption and rates of alcohol misuse, and on the other, the need to promote a more civilised approach to drinking by changing social habits. Also impinging upon this debate was the question of the freedom of the individual. What legal restrictions were justifiable in limiting a person's choice as to where, when and how he drank? And what were the minimum requirements that would ensure a balance between individual choice and responsible control in the interests of the wider community?

d) The conduct of licensed premises. The problem here lay in the concept of 'vicarious responsibility' and the 'fairness' of such a legal concept in Scots law. While it was of the utmost importance to see to the good conduct of licensed premises and to hold a licensee accountable, it was also important to prevent an injustice through that person being held accountable for breaches of the law genuinely out of their control.

e) Temperance polls. These were veto polls which involved keeping certain areas 'dry' or 'limited' by the placing of a prohibition or restriction on the sale of alcohol within a given community. Anachronism or local democratic right?

f) Registered clubs. Since clubs were registered with the sheriff and not licensed in the normal way, certain problems arose in their supervision by the police. The principle at stake was whether club members had a right to 'privacy' within their own clubs or whether the public had a right to ensure good order through police access and supervision.

g) The law and young people. At what age and in what circumstances should young people be allowed to i) enter licensed premises, and ii) consume alcohol?

It was principally on these issues that the pressure groups and the public were invited to submit evidence and it is to this evidence and the positions of the pressure groups that the next section will turn.

VII. The Pressure Groups: their positions and influence

The Licensing Authority

The debate concerning the licensing authority focused on four different types of proposal. The first favoured the status quo with the retention of a licensing court at district level composed of elected representatives and justices of the peace. This was favoured by the largest single group of organisations, mainly composed of the local authority bodies including the Association of County Council, Convention of Royal Burghs, the cities of Edinburgh and Dundee and other bodies such as the Association of Chief Police Officers (Scotland). They felt the existing system to be in the main satisfactory and that the inclusion of JPs was desirable on the grounds that they were politically impartial, less subject to pressures than elected representatives and ensured continuation of policy. These submissions gave the impression though that the local authority bodies favoured the status

quo principally because they lacked ideas in any other direction. However, it may not be that difficult to see why such an attitude should have prevailed given that local government reform was imminent. Whether it was a product of indifference engendered by an uncertain future or whether it was more a reaction of entrenchment to retain as many functions at district level as possible in the face of impending change is difficult to judge accurately. Perhaps simply they were aware that whatever changes took place would be 'small beer' compared with what was to follow.

The second proposal favoured was to use the new district authority, or some part of it, as the licensing authority. This was favoured by a small number of bodies including Glasgow and Aberdeen Corporations. The argument was for the licensing authority to be composed entirely of elected representatives on the grounds that they would be both knowledgeable about local conditions and accountable to the electorate. This would omit JPs who, it was thought, were not accountable and move licensing from a 'judicial' function to an 'administrative' one.

A third and opposing view was that the licensing system should be a function of the sheriff on the grounds that the system would thereby be beyond suspicion of corruption and, where there was a dispute there would be impartial examination of the evidence. This line was most strongly argued by the Church of Scotland. They pointed out that the emphasis on local knowledge could also mean increased opportunities for corruption.

'For there to be intimate local knowledge there is a much greater chance of there being local pressure and undue influence no matter from whom it comes... The retention of the present system because of the use of local knowledge is a proposition of dubious value'.⁵⁰

A fourth proposal was for a new type of 'ad hoc' statutory body along the lines of a tribunal consisting of laymen appointed by the sheriff. Apart from the Law Society of Scotland this idea had little support.

In its deliberations the Committee quickly established criteria against which the issue was to be judged. The premise from which they began, originally contained in the Guest Report, was that licensing was not an appropriate function for the Sheriff Court. Even though decisions of a court had an authority and credibility because of the manner in which they were reached, licensing was not, according to the Committee, a judicial function per se. Rather, it was a system of administrative control of a commercial activity through which a number of competing considerations were balanced. Once this had been established, logic suggested that 'responsibility should be placed on an established administrative body answerable to the electorate - namely in view of the local nature of licensing decisions, the district council'.⁵¹

The Committee's decision had implications for local democracy itself - for if the objections to the local authority as licensing authority were upheld, they could amount to objections to the system of local government itself. Licensing was only one of the many functions involving private commercial interests which the local authority exercised on behalf of the community, so to single out licensing on the grounds of possible corruption was inconsistent since it ignored many other areas of local government where corruption was also a danger. Another point in favour of the local authority exercising administrative controls of this nature was that it could exercise its discretion in accordance with a stated policy on the location and conduct of premises and their effect on surrounding amenities.

The recommendation made was that licensing courts should be replaced with licensing becoming a function of licensing authorities ('boards') appointed by the district council in the same manner as a committee of the council. The decision to go for a new set up of 'licensing boards' seems to have had little to do with pressure group influence since the majority proposal in favour of the status quo, which had some powerful subscribers, was eventually rejected. The proposal for a local authority licensing board, on the other hand, did not command, numerically at least, widespread support. In this instance the decision would seem to stem primarily from the interpretation of the conclusions reached by the Guest Committee on the matter. An element of doubt though, appears in the Report as to how acceptable the proposal would be to public opinion. The Report commented:

'The possibility that public opinion may not at present be prepared to contemplate it should not prohibit discussion of its merits'.⁵²

This decision was very much in keeping with the working philosophy of the Committee since it was illustrative of two of its main features. Firstly, through its deliberations a principle was established from which a logical argument developed despite the outcome not being the most popular of the options. And secondly, the Committee, aware of this, demonstrated the capacity to take a forward view, by recommending it on the basis of envisaged shifts in public opinion.

The Types of Licence

The basis of the law was that it was an offence to sell exciseable liquor without holding a certificate granted by the licensing authority or in contravention of the conditions of a particular certificate. Five types of certificate were available in Scotland: hotel, public house, off-sale, restaurant and restricted hotel.

The views submitted to the Committee fell broadly into three categories - that five types of certificate were sufficient to meet requirements; that five were too many and should be reduced and simplified; and that five were not enough and additional certificates should be added to meet changing circumstances.

Those who favoured the status quo included several of the churches and temperance organisations, the local authority organisations, the legal bodies and ACPO(S). Typical of the temperance lobby was the National Temperance Federation who thought that the primary purpose of licensing was to protect society rather than make it easier for people to drink. They were particularly concerned at the development of off-sales in supermarkets and felt stricter control should be exerted over their issue to protect women and young people under 18, who it was considered were particularly vulnerable to this type of selling. The Church of Scotland also wished to see restriction in off-sales, both in terms of hours, which they thought should be co-extensive with normal shopping hours, and in terms of premises, so that off-sales certificates should not be granted to premises with an on-sales certificate. They also strongly opposed the suggestion of licences for cafes, a point similarly made by ACPO(S) who thought that 'extending liquor sales to cafes is undesirable, principally because they, a) seldom have the amenities required, and b) tend to draw on the young, many under 16 years, for their habitues'.⁵³

There were several suggestions for the reduction in the number of types of certificate in order to simplify the system. These came mainly from those involved in the licensing trade and usually centred around difficulties they had encountered with the law. For instance, the British Hotels and Restaurant Association (Scottish Division) wanted to see certificates reduced to simply pub, hotel and off-sale,

while the Licensed Grocers and Wine Merchants' Association of Scotland advocated replacing licensing of off-sales with a form of registration of such premises with the licensing authority.

Lastly, there were those who favoured additional types of certificates for particular premises. Organisations representing the entertainments industry proposed a special certificate for cinemas, theatres, dance halls, bingo clubs and the like so as to allow for the sale of drink, but confine it to bona fide patrons only. Bodies such as the Cinematograph Exhibitors' Association (Scottish Branch), the National Association of Bingo Clubs and the Scottish Ballroom Association, all advocated an entertainments licence to be granted, provided the applicant satisfied the basic criteria of health and safety, to enable drink to be sold as an ancillary to the main entertainment activity. Self interest tended to dominate with perhaps the most blatant (honest?) appeal coming from the Company Secretary of Mecca Ltd.:

'...we would like to see a much more liberal approach and a drastic reform in the law relating to Licences for places of entertainment and catering in Scotland than has prevailed hitherto, for the simple reason that this would enable this Company to fulfill its wish to expand its interests in Scotland very considerably and with a much greater degree of confidence as to return on its investments in Scotland, which are not inconsiderable now...'.⁵⁴

Support for the cafe-type pub mentioned earlier was also evident, particularly among the pro-liberalisation school such as the Scottish Tourist Board, the British Tourist Authority, the Licensing Law Reform Society, and the Scottish Chamber of Commerce. However, the term 'cafe-pub' caused much confusion since the contributors to the debate were often talking at cross purposes. Some took it to mean a pub with the facility to serve tea, coffee, soft drinks, snacks etc., while others took it to mean a cafe licensed to sell hard liquor. Neither

really captured the intention which was to be a new kind of establishment, generically different, something along the lines of the 'bistros' of the continent. The most vociferous plea for this type of establishment came from the Licensing Law Reform Society who based their case on an existing 'cafe-pub' in Brighton. The claims made for this establishment - named 'The Vasso' - are quite remarkable and are worth quoting at some length if only for the unwitting levity of the style.

Under the rather emotive heading of 'Set the People Free', the Reform Society wrote:

'These new style establishments, with full 'on' licences, will set the scene for an entirely new pattern of social behaviour. The British public will be set free, as never before, in the history of the Nation. The family with children and particularly women will be united for the first time outside the home'.

Under the heading 'New Deal for Women', they continue:

'Women will be able to behave outside the home in just the same way as they do in the home. At any time they choose they will be able to meet their friends and enjoy a free choice, in one place, ranging between tea and coffee, cakes and pastries, or alcoholic drinks. Their children can be present with them and they need not be left at home or outside the premises. Women will be permitted to meet their menfolk on their own terms in surroundings in which they feel more at ease'.

Lastly, under the stirring heading, 'A Revolution', it is claimed:

'With the establishment in the country of what may be termed the 'Cafe-pub' a new pattern of leisure activity will emerge and a revolution in social behaviour begin'.⁵⁵

The enthusiasm of the submission can perhaps be explained by the fact that it was written by one Geoffrey Irwin, who not only happened to be Chairman of the Licensing Law Reform Society, but was also the founder and licensee of 'The Vasso'! Despite its unintentional humour the memo did highlight the need for a change in attitude towards drink and licensed premises, a matter of primary importance to Dr. Clayson and his Committee.

A need for such additional licenses was not lost on the Committee. They concluded that a reduction in the number of certificates would, far from simplifying matters, only lead to increased difficulties in the administration and supervision of premises. Accordingly, the retention of the original five certificates was favoured, along with the introduction of additional new categories. The Committee thought that an entertainments licence was a development which should be 'encouraged in so far as it might help to promote civilised drinking and breakdown the attitude that regards the consumption of liquor as an end in itself'.⁵⁶ A refreshment house certificate for cafe-pubs was desirable because it 'would keep the family together'.⁵⁷ Also recommended was a residential certificate which would allow guest houses to sell alcohol to residents only.

In relation to this decision pressure groups appear to have played a more significant part especially concerning the entertainment licence, where the interests involved presented a reasonable case for being allowed to provide alcohol as an ancillary to entertainment. Their obvious commercial self interest should not, however, be forgotten. Nevertheless, the logic of Clayson's recommendation can be defended on the grounds that many of these entertainment establishments were already supplying alcohol under public house certificates. The new type of certificate was more appropriate in that it confined sale and supply to bona fide patrons.

The issue of the cafe-pub also seems to have been influenced by public opinion as was shown by the OPCS survey which indicated that over three quarters of the sample were in favour of such premises.

The Committee's rationale, then, again illustrates the underlying theme of liberalisation which came to be an integral part of the Committee's 'working philosophy'.

The Hours of Sale and Supply

The subject of the permitted hours of opening was by far the most popular in terms of submissions received and by far the most controversial. Everyone, it seemed, had some opinion to offer, ranging right across the spectrum from the liberal to the restrictive. The first question to be tackled was whether a system of permitted hours was necessary at all. The Brewers' Association of Scotland (BAS) was not entirely convinced that it was:

'Given strong control over the granting of licenses, there would be many attractions in having complete freedom regarding licensing hours. Under such a system, the individual licensee would be able to decide when to open and close his establishment according to public demand. Whilst this may conjure up pictures of uncontrolled drinking 24 hours a day, it is felt that in practice, public demand would quickly dictate sensible times of operation'.⁵⁸

However, this particular argument gave the impression that the Brewers were angling to see how far they might push the Committee for they quickly and realistically conceded that 'this would be a very radical step which may not be acceptable to the Government'.⁵⁹ Their submission then continued to outline a detailed fallback position which identified the areas where they felt the law was in need of improvement.

It was generally accepted by the other trade organisations, the legal bodies, the local authorities, the youth organisations and the police that there was a need for some form of control over the number of permitted hours. Such a need being established the question then was what those hours should be.

While there were few representations to make the law even more restrictive there were a number of organisations, mainly the churches and temperance groups, who took the view that it should not be any more liberal. The Church of Scotland argued that 'the law cannot

countenance greater permissiveness but must aim at checking the further spread of alcoholism by effectively limiting the distribution and availability of alcohol'.⁶⁰ The Free Church, in much the same vein, thought that 'restrictive laws were brought in to curb excessive drinking and such laws are no less necessary today in view of the increasing consumption of alcohol and the accompanying increase in the prevalence of alcoholism'.⁶¹ The Congregational Union of Scotland attacked the Brewers, who they said, wanted an extension of hours for financial gain since 'they are motivated by profit as much as, if not more, than by the convenience of the public'.⁶² The Scottish Band of Hope Union were the most militant in that they 'would welcome an immediate closure of all public houses', but realised 'that this may not be possible'.⁶³

However, not all of the religious and temperance groups were so reactionary. The British Temperance Society, whose submission was originally made to Errol, felt that as prohibition was inoperable, and restriction of hours had not worked, a more relaxed approach to opening hours might prove conducive to creating a more civilised atmosphere for consumption. Similarly, the Roman Catholic Bishops in Scotland thought that 'a more relaxed form of permitted hours would be for the common good'.⁶⁴ Longer hours, they proposed, would lead to more social drinking and in effect minimise the number of people involved in hard drinking.

On the other side of the coin, not all of the trade organisations were in favour of relaxation and increased hours. The National Association of Licensed House Managers (NALHM) was against any extension of hours on the grounds that their members, and bar staff generally, worked long enough hours without taking on any additional burdens. The Scottish Licensed Trade Association (SLTA) was also opposed

to any discontinuation of the afternoon break. They favoured its retention so as to allow staff a break from service to the public for food and rest, for family relationships and for cleaning and restocking the bar. In theory they said, the answer would lie in a shift system, but there were practical difficulties in obtaining suitable staff and even if available, their extra cost would necessitate a rise in the price of the service.

It is interesting to note the different perspectives from which this problem was viewed. The NALHM and SLTA were protecting the interests of their own members. The Brewers, however, favouring relaxation, thought that the SLTA took an over protective approach to the question. A senior Brewers' executive was later to remark that there had been 'differences between the BAS and the SLTA over the issue'.⁶⁵ The BAS position was that licensing hours should 'satisfy public demand and not suit the industry which was providing the service to the public'. He conceded that staff hours had to be taken into account since they had 'cost implications which had consumer implications'. However, the argument 'was not only about remuneration but also about responsibility'. According to another Brewers' executive,⁶⁶ NALHM took the view that the increased hours would correspondingly mean an increased amount of personal responsibility for their managers, whereas the Brewers saw the extension of hours as an opportunity for managers to delegate responsibility.

This was an interesting confrontation since it illustrated the divisions within the 'trade' itself, with the Brewers viewing the problem from the side of 'management' and being concerned with increased sales and increased profits, while the NALHM and SLTA viewed the problem in terms of the interests of their members and their working conditions.

Amongst those organisations favouring relaxation - a considerable majority - views differed markedly as to how far and in what way permitted hours should be extended. Some such as the cities of Dundee and Edinburgh, along with ACPO(S) favoured as early as a 9 a.m. start, while the STB, STUC and BAS opted for 10 a.m. However, the majority, including the Association of County Councils, the Convention of Royal Burghs and the other trade organisations remained faithful to 11 a.m. Proposals for an appropriate closing time were equally as varied with the most radical again coming from Edinburgh Corporation who suggested 2 a.m. Other liberal suggestions came from the STB and ACPO(S) who thought a terminal hour of midnight was justified to meet public demand. The most common recommendation though, was for an 11 p.m. closing, giving an extra hour in the evening.

Majority opinion favoured 11 a.m. opening and 11 p.m. closing, although within that period a number of options were proposed. General feeling though, was that either the afternoon break should be done away with altogether, or, if a break was to be retained, it should be at the discretion of the licensee, thus allowing for a degree of flexibility.

The question of Sunday opening of public houses proved to be another issue of controversy. Once again, the churches and temperance bodies and some sections of the licensed trade (NALHM) opposed Sunday opening. The churches and temperance groups based their arguments largely on the principle of Sunday observance and the desirability of preserving the tradition of the Scottish sabbath with its emphasis on family life. The Church of Scotland argued that 'in positive concern for man's wholeness as a spirit-body creature, the necessity of the weekly holiday for Christian and non-Christian alike is not in doubt'.⁶⁷ NALHM were concerned that Sunday was the only rest day for many of

those employed in public houses, a point endorsed by the Church of Scotland who criticised 'the putting of profit and self-interest before concern for those who have to work'.⁶⁸

The other sections of the trade, the BAS and SLTA, were in favour of Sunday opening, although the SLTA emphasised that it must be optional with discretion to open or not left to the licensee. Others backing Sunday opening included ACPO(S), the STUC and the RC Bishops. The case was largely based on the fact that public demand for liquor tended to be no different on a Sunday and that the closing of public houses only resulted in the gross overcrowding of hotel bars. However, those supporting Sunday opening did concede to the religious nature of the day in that general support seemed to be for a later opening, around 12.30 p.m., to avoid the possibility of offending morning church-goers. Organisations representing the off-sales section of the trade appeared unconcerned over Sunday opening with the Licensed Grocers and Wine Merchants content to remain closed.

These recommendations were duly considered by the Committee. In their deliberations they attached 'considerable importance to the desirability of removing any element which conduces to undesirable drinking practices and of encouraging what we might call civilised drinking'.⁶⁹ To this end the Committee were convinced of the need to retain a system of permitted hours, but were impressed by the weight of evidence in favour of an increase in the number and flexibility of those hours. Accordingly, opening hours of 11 a.m. to 11 p.m. were recommended which the Committee felt to be a 'reasonable extension in all the circumstances'.⁷⁰

However, it was noted that some reputable organisations such as the STB and ACPO(S) had recommended a terminal hour of midnight. While recognising the advantages in this, the Committee feeling at

the time was cautious - 'we are not convinced that there is a substantial body of public opinion in Scotland which is ready at this stage to support general extension of the permitted hours in public houses until midnight'.⁷¹

Here there would seem to be good evidence of one of the Committee's 'tactical' decisions. The Committee were tempted by even more liberal hours than those they recommended, but restrained themselves to what they thought were realistic proposals in face of public opinion, and more importantly, in face of what would be acceptable to Government. Their 'forward looking view' therefore, had to be tempered with a considerable amount of pragmatism and political astuteness. The Chairman, in particular, was very aware of this problem of reconciling what was desirable with what was feasible. Dr. Clayson was later to comment that it was of the utmost importance as 'this was where Errol came to grief'. His own Committee he said, 'were constantly asking themselves - "is it practical; could we get away with it?"' In this instance of opening until midnight, the police favoured it and in principle so did the Committee, but 'of course, we realised that Parliament would be unlikely to swallow it'. Dr. Clayson concluded 'it was not wise to go the whole hog; if we had, the thing would have been killed stone dead'.⁷²

On the question of Sunday opening there were two issues at stake - the principle and the actual hours of opening. As regards the principle, the Committee, while respecting the sincerely held beliefs of those who wished to retain the traditions of Sunday observance, accepted that public opinion had moved on the issue and that a less restrictive attitude now prevailed. Restrictions on a Sunday could no longer be justified on Sabbatarian ground alone. Further, since there was evidence to suggest that existing hotel facilities were not adequate

and since the Committee were sympathetic to the argument that the closure of public houses on Sunday detracted from the social benefits normally associated with a day of rest, they took the view that in principle pubs should be permitted to open at the discretion of the licensee.

That principle established, the problem remained of when to open. It was felt appropriate that the earliest time at which licensed premises should open on Sundays was 12.30 p.m. to avoid a clash with the usual times of morning church services. Closing time was to be 11 p.m. since the Committee could see no justification for an earlier time, and as on weekdays, hours of business would be at the discretion of the licensee. Off-sales were also to be permitted since it was considered illogical to allow for on-consumption but not for off-consumption.

This issue was the first to cause a note of dissent from the general conclusion. Miss Morag Faulds dissented from the majority opinion being opposed to the idea of Sunday opening of public houses. The dissent was entered as a footnote in the Report. The manner in which the dissent was expressed represented another important tactical decision by Dr. Clayson. He was determined not to have a minority report on the grounds that such a report would diffuse the impact of the main report. He later indicated that he had had to exercise all of his Chairman's authority on that point as Miss Faulds had 'wanted to write a long script of dissent and so had to be told firmly, but politely, "no"'.⁷³

Given that virtually all the submitting organisations had some opinion to offer on permitted hours, it is not possible to establish any one particular influence of importance. Perhaps the most important feature was the need to relax the pressure to drink,

the main question being to what extent. While a number of responsible organisations argued for a radical reform, the Committee had to balance these views with their assessment of what would be acceptable to public opinion at large, and more importantly to those in Government who would be responsible for drafting legislation on the basis of the Committee's recommendations. Their pragmatic approach, sought to combine their theoretical commitment to liberalisation with a practical appraisal of the politically acceptable.

The Conduct of Licensed Premises

The decision to allow the majority view to be expressed as the Committee view, with instances of dissent being confined to footnotes in the main report, was to affect the Chairman himself when he found that he was in the minority over the issue of vicarious responsibility. The concept of vicarious responsibility is a technical and legal matter which concerns the nature of the responsibility of those engaged in the management of licensed premises for their good conduct. The certificate holder has overall responsibility for the conduct of the premises, including the conduct of his staff and their control over the premises. It has been generally accepted that in the case of a contravention of the criminal law, the licensee was vicariously liable for the acts or omissions of his staff, that is, he could be guilty of an offence. However, the sheriff's decision in the *Noble v. Heatly* case in 1967 cast doubt on the certificate's holder vicarious responsibility for acts or omissions of his staff.⁷⁴ In that case the Sheriff held that the certificate holder was not criminally liable as he did not 'knowingly' permit the offence. This left the law in some confusion.

Understandably on a technical issue such as this the most informed representations came from the legal bodies. The Law Society of

Scotland for instance, recommended that 'vicarious responsibility in all circumstances be imposed on the licence holder for the conduct of the premises and for breaches of certificate by his staff'.⁷⁵

Similarly, the Faculty of Advocates supported vicarious responsibility being absolute.

The Committee was of the view that a certificate holder must carry a high degree of responsibility for the overall conduct of the premises. Thus, it was accepted that a certificate-holder should have vicarious criminal liability, but whether it should be absolute or stop short of being absolute left the Committee divided. The majority view was that in applying for a certificate a certificate holder entered into an implicit undertaking that the law would be observed in his premises. On the other hand some of the Committee considered that to place the burden of absolute vicarious responsibility on a certificate holder was unfair since it would ignore the practical conditions that prevailed in licensed premises and the possibility that an offence might take place without the certificate holder's knowledge.

It was Menzies Campbell who was responsible for persuading the Chairman that vicarious responsibility should not be absolute on the ground that it was contrary to the principles of Scots law for a licence holder to be held responsible for the misdemeanours of his staff. Yet despite the Chairman being won over the rest of the Committee, with one exception (Mr. Kerr), were not. In fact, the Committee had received an explanatory memo from Mr. Cowperthwaite, a senior civil servant in the SHHD indicating that the issue had already been canvassed in the Scottish Office and the consensus was that vicarious responsibility should be absolute.

It is difficult to assess the significance of this action from the Scottish Office. Its significance may lie in it being illustrative

of the potential of the Scottish Office to influence outcomes on matters that are technically and legally complex involving considerations of which the average committee member may not be fully aware, or even interested.

Dr. Clayson then, had to abide by the rules he himself had set. The Committee view was held to be that of the majority which favoured absolute vicarious responsibility, with those subscribing to the minority view having their names recorded accordingly.

Temperance Polls

The temperance or 'veto' poll originated from the Temperance (Scotland) Act 1913. Its underlying idea was that if a sufficient majority of the inhabitants of an area were opposed to the existence of licensed premises in that area, then no certificates could be granted, making the area 'dry'; or alternatively a limitation could be imposed on the number of certificates issued to control the number of licensed premises in the area. At issue was whether this was a fundamental democratic right of the local populace or merely a cumbersome anachronism.

Not surprisingly, the continuation of temperance poll legislation was favoured by all of the Scottish temperance groups and by virtually all of the churches. The Church of Scotland for instance, was unable to accept any suggestion that the veto poll be abolished:

'We are adverse to any attempt to deprive the people of their democratic right to express their views and to have such views implemented if shared by a sufficient number of people in the neighbourhood. Indeed, it is our belief that the more people are encouraged to take a responsible interest in their local affairs the better it will be for the country as a whole'.⁷⁶

However, this view was not shared by the RC Bishops who argued:

'At present where they are successful the problems and supervision of drinking are merely transferred

to another area which already has its own problems to deal with'.⁷⁷

For this reason they recommended the abolition of veto polls, a sentiment at variance with all the other churches. The local authority organisations also came down in favour of abolition mainly on the grounds of the difficulties they created for planning.

As one might have expected though, the most vociferous representations to have temperance poll legislation repealed came from the licensed trade and the Brewers. To protect itself against veto polls the licensed trade had its own special fund - the Scottish Licensed Trade Veto Defence Fund. The SLTVDF's submission was by far the most detailed analysis of the temperance poll issue, covering such aspects as the nature of veto polls; the trends, costs and anomalies created by polls; the problems for local authorities in planning and control; and the operation of clubs in 'limitation' and 'dry' areas. In their opinion the distribution of licensed premises should be planned to meet the needs of each community. Further, they argued that residents did not have a democratic right to determine policy in regard to the sale of liquor in their own area, only a democratic right to influence the policy of their elected representatives, who had a social responsibility towards the residents.

This line was also the one on which the BAS chose to base their case:

'The democratic right of individuals to object to the granting of a licence, or to the standard and conduct of existing premises, is surely safeguarded by their normal rights to object to the granting or renewal of a licence at the Licensing Court or, indeed to the Planning Authority. In addition, the individual has the normal rights of access on these matters to his local councillor and ultimately to his Member of Parliament. There would seem to be no logical reason therefore, why the individual should be afforded greater powers of protection in this particular field, and it is therefore submitted that the democratic arguments are not realistic'.⁷⁸

One of the most influential factors in the Committee's deliberations seems to have been the changing use to which veto poll legislation was being put. One of the effects of post-war development and reconstruction in the West of Scotland was the creation of large housing estates situated on the periphery of Glasgow. Designed to rehouse the populace from the derelict inner city areas, they suffered from a peculiar Corporation resolution passed in 1890 preventing alcohol from being supplied on Corporation property. The result was vast estates without a single licensed premise. Inhabitants of adjacent areas, apprehensive of the possibility that their locality would provide sites for such licensed premises, with all the attendant problems of nuisance and risk to public order, resorted to veto legislation to enforce restrictions. The restrictive resolution thus moved from being a sentiment of temperance to a defensive measure over amenity.

The use of veto polls in such a manner was not thought to be a legitimate one by the Committee:

'What is clearly objectionable is that, in a situation in which it is generally accepted that there should be licensed premises providing facilities for the consumption of alcohol it should be possible for the inhabitants in the immediate locality to prevent them being provided on a site which is otherwise appropriate for the purpose. One need only consider the extension of this principle to some other generally desirable but locally unpopular facility, say a prison, to see that it is untenable'.⁷⁹

Therefore, in agreement with the vast majority of witnesses, the Committee recommended that temperance poll legislation be repealed. A major factor in this decision was the general change in public attitudes toward the social use of alcohol. The temperance movements were no longer as widespread as they had been at the end of the 19th century and public opinion had moved far from the austerity of Victorian values. While advocates of temperance were acknowledged

to hold sincere beliefs, the Committee felt veto polls were no longer compatible with modern social conditions. By applying only to the retail sale of alcohol veto polls treated the activity of drinking as something special and apart. The objective of the Committee, on the other hand, was to de-mystify such traditions and practices with a view to promoting a more civilised approach to the consumption of alcohol.

Registered Clubs

Members' clubs have a special place in the law since they are not 'licensed' but registered with the sheriff. Two main issues arose in this context - i) whether the existing system of registration should be retained, and ii) the nature of police supervision.

The principle underlying the law relating to the supply of liquor in registered clubs is that all property of the club, including the stock of liquor, belongs to the members collectively and that when a member obtains liquor what takes place is a supply rather than a sale. To qualify for registration a club must meet certain conditions regarding its constitution, membership and the like. The certificate of registration is then granted by the sheriff, not by the licensing court.

The line taken by the club organisations which commented was that by and large the arrangements for registration were satisfactory in that they preserved the private nature of clubs. The Working Men's Club and Institute Union (WMCIU) for instance, stressed the essential difference between a public house which is open for business to members of the public, and a members' club, which is set up by a group of individuals for some common purpose and in which the supply of liquor is restricted to members and their guests. On the other hand a number of organisations, mainly the churches and licensed trade

organisations, proposed that members' clubs should be licensed in the same way as licensed premises. Majority opinion though, favoured the status quo, raising no objections in principle to the system of registration with the sheriff. The Committee also favoured this line, judging registered clubs to be different in kind from licensed premises and recommending club registration by the sheriff be maintained.

More controversial was the question of police supervision of clubs. Unlike licensed premises which are subject to police entry and inspection at any time, registered clubs cannot be entered or inspected unless the police have a warrant authorising them to do so. The club organisations strongly opposed any suggestion that the police should have unrestricted right of entry to registered clubs. The WMCIU argued on the basis that the control of the club was the responsibility of the club committee who had it in their power to discipline members. In addition, if there were abuses of the law in the club premises the police already possessed adequate powers to deal with them. Any suggestion of police entry to clubs would not be tolerated either by the officials or members of clubs.

The Association of Conservative Clubs also took a strong line against unrestricted police entry:

'This Association takes the view that a members' private Club is a mutual association of persons for particular objects and is strictly of a private nature.... Apart from those occasions already provided by legislation for the entry of the police other than by warrant, any open ended right would be a grave intrusion on the privacy of individuals in association'.⁸⁰

Essentially, the feeling was that a club was not 'a place of public resort' and the usual protection felt to be needed by the public was not required.

On the other hand there was considerable support for the opposite view that registered clubs should be subject to the same police

supervision as applied to licensed premises. ACPO(S) argued quite simply that 'the law relating to clubs should be strengthened to make them subject to the same police supervision as other types of licensed premises'.⁸¹ The SLTA made a similar recommendation and support was also forthcoming from the local authority organisations, the churches and the legal bodies.

In its deliberations the Committee agreed that a case for the police right of entry to registered clubs existed. While accepting that such a right of entry involved to some extent an invasion of the privacy of private associations, the Committee attached greater importance to the control of the conduct of the premises because of the contribution this could make to improving drinking habits and attitudes towards liquor. The public interest in ensuring the maintenance of standards was thus placed ahead of any infringement of privacy. Emphasising that any club which conducted itself properly within the law should have no possible objection to police supervision, the Committee recommended accordingly that the police should have a right of entry to registered clubs as to licensed premises.

The important influencing factor in this case would seem to be the clear cut majority of organisations in favour of unrestricted police entry, and also the 'weight' of that opinion which included the police and the legal societies. Another contributing factor must be the fact that the First Guest Committee had reached a similar conclusion on the matter some twenty years earlier. Lastly, not only did opposition to unrestricted police entry come from the clubs themselves, leaving them open to the criticism of self-interest, but the nature of their main argument, that entry as of right would constitute an infringement of privacy, was based on an assertion, which was in the words of the Report, 'a matter of judgement'.

The Law and Young People

One of the most controversial issues which arose in the course of the Committee's enquiries concerned the law and young people. There were two main considerations - at what age should young people be allowed access to licensed premises and at what age should they be allowed to buy and consume alcoholic liquor in those premises. Virtually all of the submitting organisations had something to say on this issue, particularly the various youth organisations.

The law as it stood prevented children under 14 from being in the 'bar' of licensed premises during permitted hours; a 'bar' being carefully defined in the 1959 Act. However, there were no age restrictions on the admission to licensed premises, except to a 'bar' as so defined. This meant that it was permissible for persons under 14 to enter a licensed restaurant, hotel lounge or railway refreshment room. At issue was whether such a provision should be extended to public houses to allow children under 14 access.

A small number of submissions took the view that the minimum age for access should be raised. The Scottish Temperance Alliance favoured 16, while Aberdeen Corporation advocated 18, on the grounds that it would reduce the high incidence of under-age drinking. The YWCA of Scotland went as far as to suggest 21, but gave no reason other than to assert that greater controls would assist in restricting drunkenness.

A greater number of organisations simply supported the status quo, among them the churches, some temperance organisations, the local authority organisations, ACPO(S) and some of the youth organisations, such as the Scouts, Boys Brigade and Girl Guides.

The licensed trade itself tended to be divided between the retention of the existing system and a modest relaxation for children's

access. NALHM and the SLTA opposed the entry into public houses of children below the age of 14. NALHM's argument reflected obvious self-interest:

'It is our contention that the traditional British pub is the centre where grown-ups can gather, exchange gossip, discuss business or just spend a pleasant time in good company. To introduce children into these surroundings would have a distinctly harmful effect on the atmosphere of the present pub. It would drive away many of our present clientele - and this assertion is based on our own research among our own members'.⁸²

The SLTA took the line that the availability of children's rooms in some establishments was sufficient to cover the need for such facilities. They were greatly concerned by the 'unfortunate fact that certain licensed premises still existed where children should not be allowed to go'.⁸³ The BAS were a bit more liberal suggesting that children under 14 should be allowed into certain bars such as lounge bars and cocktail bars where these were ancillary to a restaurant or other catering facility.

There was also considerable support from a wide variety of organisations that the law relating to children's access should be relaxed more widely. In the view of the Scottish Standing Conference of Voluntary Youth Organisations, 'the crux of the whole matter is for proper and adequate education of the young in regard to the risks and dangers attendant on the abuse of drinking alcoholic beverages'.⁸⁴ Similarly, the Working Party on Youth-at-Risk commented that alcohol related problems could be better controlled 'in a society which educated its young in the proper use of alcohol, instead of trying to keep them away from it with laws which reflect the views of religious extremists of the nineteenth century'.⁸⁵

The Educational Institute of Scotland went even further and suggested that 'it should be lawful for parents or guardians to purchase

liquor for consumption by their children or wards in a bar or other licensed premises'.⁸⁶ In so doing they created a storm of controversy within the E.I.S. The proviso to the recommendation was that the young persons were in the company of their parents or guardians at the time of such consumption. However, even with this proviso the recommendation was widely disputed by a number of E.I.S. members.

The recommendation had been part of the original E.I.S. memorandum to the Clayson Committee which had been drafted by Mr. Raymond Thomasson, the Assistant Secretary. This memo had gone forward to a sub-committee of the Executive which approved it, before it proceeded to the full Executive in January 1972. At this meeting of the Executive an amendment had been moved which sought to delete the controversial recommendation. This though, had been defeated by 13 votes to 6 and the memorandum was passed with only a minor technical alteration.

Once passed, the memorandum was published in 'The Scottish Educational Journal', the official paper of the E.I.S. (of which Mr. Thomasson happened to be the editor). At this juncture some of the grass roots membership, upon reading the published memo, took exception to the recommendation and expressed their dissatisfaction with it. So much so that Mr. Thomasson wrote a defence of the Institute's evidence in a subsequent edition of 'The Scottish Educational Journal' explaining the intention behind the recommendation.

The intention, the article said, was to enable parents to give some guidance and example to their children in the proper use of alcohol. The law was inconsistent in that it allowed parents to supply, and under 18 year olds to consume, alcoholic drink privately in the home, but when such activities were public it became an offence. It was emphasised that the E.I.S. were not saying that parents *ought* to

introduce their children to strong drink, the point was that parents should be 'free to follow their own judgement and conscience in the way they bring up their children in this matter, untrammelled by the present archaic licensing laws which surround the subject with an aura of furtiveness'.⁸⁷

However, some of the membership remained unconvinced and this was recorded in the E.I.S. oral evidence to the Clayson Committee in April. The E.I.S. delegate commented:

'The Institute's proposals have been widely misinterpreted or misunderstood by some Institute members amongst others. A number of our members felt so strongly about what they thought we were saying, in fact, that they wrote asking to be disassociated from the sentiments expressed. I think it is right to put this disavowal of the Institute's proposals by some of its members on record'.⁸⁸

Even for a Committee dedicated to liberalisation, the E.I.S. proposal was too radical and, in any case, would have involved too many potentially anomalous consequences. However, this was not to rule out the possibility of *admission* of young persons to licensed premises. The Committee's view was that although there were many premises into which it would be unsuitable to take children under 14, in other carefully controlled circumstances with proper safeguards, no harm need result from their admission. The Committee wrote:

'We have difficulty in accepting the argument that exposure of children to an environment in which people are drinking is bad in itself regardless of the conditions and circumstances in which the drinking is taking place. Where the conditions are right we see no reason why a child should not be present in a bar in a hotel, a restaurant or even a public house in the company of his family'.⁸⁹

The Committee proposed that it should be left to local judgement as to which premises were thought suitable for the admission of children under 14, and, to cover this recommended the introduction of a 'children's certificate'.

This recommendation again fitted into the Committee's working philosophy of educating people, especially young people, in the proper use of alcohol. The idea that the family should be able to stay together and the children introduced to a drink in a civilised environment, thus dispelling many of the mysteries which surrounded drinking establishments, was very much to the fore. Their view was that children should come to see drinking, in the right conditions, 'as simply an incidental part of normal social activity'.

A strong influence in this decision must have been some of the more important youth organisations who recognised the need to educate young people in the social activity of drinking. Without their backing it would seem unlikely that Clayson could have proceeded with such an innovative recommendation. The reason that the majority of opinion was in favour of the status quo would seem to lie in widespread apprehension that the necessary safeguards would be maintained over the suitability of premises. What must be borne in mind is that at that time a great proportion of public houses probably were unsuitable. The vast improvement in premises and the proliferation of well appointed lounge bars is only a phenomenon of the last decade, so it is perhaps understandable that opinion should have been on the cautious side in the early seventies.

The second main issue of controversy concerned the age at which young people should be allowed to purchase and consume alcoholic liquor. The law as it stood then prevented anyone under 18 from buying liquor in licensed premises, with certain exceptions relating to those over 16 purchasing beer, porter, cider or perry for consumption with a meal not served in a bar. Persons under 18 could not consume liquor in a bar, but they could elsewhere in licensed premises such as restaurants.

Only a limited number of organisations submitted that the age of 18 for the purchase or consumption of liquor in a bar should be reduced. The STUC, the Convention of Royal Burghs, the Scottish Liberal Party and the Scottish Council of the BMA all suggested 17. The Scottish Young Conservatives and Scottish Chamber of Commerce favoured 16. The main arguments rested on the notions that young people were maturing earlier both physically and mentally; that lowering the age would lessen the temptation to challenge authority; and that the limit of 18 was unenforceable in any case leading to young people acquiring early drinking experience in illicit circumstances.

Against this, the overwhelming majority of opinion opposed any lowering of the age. Right across the board there seemed to be agreement on the desirability of retaining the status quo with the churches and temperance organisations, the licensed trade associations, the BAS, the local authority groups, ACPO(S), the legal bodies, the bulk of the youth organisations and the majority of medical opinion all supporting this line. The churches and temperance groups tended to emphasise the possibility of increased teenage drunkenness and violence and the dangers of earlier exposure to the harmful effects of alcohol. Another salient point made by a number of organisations was that the challenge to authority by some 17 and 16 year olds by evading the law would simply be transferred to a lower age group, and while the law as it stood may have been unenforceable, it still had an influence on social attitudes and behaviour. The licensed trade, in particular, pointed out the difficulties of assessing the age of young people and how such difficulties would be aggravated by a reduction in the legal age of consumption.

The Committee considered in great detail the arguments presented both for and against lowering the age for consumption before coming

down in favour of retaining the age of 18. There were a number of specific reasons for this. Firstly, it was agreed that a reduction in the limit might lead to an increase in teenage drunkenness and in drink related crimes. Secondly, reduction to 17 would result in longer exposure of the young drinker to the harmful effects of alcohol, since medical evidence had shown that young people, for any given intake of liquor, retain higher blood/alcohol levels for longer, making them 'unable to hold their liquor'. Thirdly, lowering the age to 17 would increase pressure on even younger people to obtain drink and the problem of identifying legal from non-legal drinkers would merely be shifted onto a younger age group. Lastly, the age limit of 18, despite the extent to which it may be ignored, must have an influence on social attitudes and behaviour.

Mr. Menzies Campbell later indicated that the issue was one of the most controversial which came before the Committee. He said that several of the Committee had firmly believed that the age should be reduced from 18 to 17. He himself had favoured such a reduction, but 'eventually came down against it, being persuaded by the volume of evidence'.⁹⁰ The most powerful and influential argument was that a reduction to 17 would make identifying under-age drinkers even more difficult and existing problems would only be transferred onto younger people. With the exception of Mr. John Kerr who dissented, the rest of the Committee reached the same conclusion and felt supported 'not only by the overwhelming weight of evidence, but also by the quality of the evidence submitted'.⁹¹

VIII. Decision-making within the Committee

During the course of its early deliberations the Committee developed a definite working philosophy against which to assess the substantive issues that were to come before it. But what kind of values were involved in this working philosophy? How did the Committee, individually and collectively, judge the evidence? What factors were important in influencing their interpretation of material? How did they arrive at their recommendations?

The values which underpinned the early commitment to relaxation can perhaps best be described as those associated with classical liberal reformism. The Committee viewed its task as being to drag Scottish licensing law from its dark ages into the last quarter of the 20th century, by promoting an environment which would be conducive to 'more civilised drinking'. It was realised that a change in Scottish drinking practice would not come about overnight, but would only be achieved through decades of re-educating public attitudes in Scotland towards the social use of alcohol. While the individual was to be given greater freedom it would increasingly be the collective social sanctions and disapprobation of the community that would guide drinking behaviour rather than prohibitive legal restrictions. For the proposed reforms to be successful the underlying assumption was that the new individual freedom would have to be accompanied by greater individual responsibility.

On this basis it is hardly surprising that the Committee was wary of any extreme recommendations made to it. The two extreme proposals at opposite ends of the spectrum - complete freedom to drink without restriction at one end and complete abolition of the brewing and distilling industries at the other - were regarded as self-cancelling. Some of the letters from individual members of the public tended to

fall into these categories, arguing one extreme or the other. One such example came from C. F. H. McFadyen, M.B., Ch.B., who recommended in the strongest terms that 'brewing and distilling be done away with in the public interest since there can be no apologetic for the use of alcohol save as a surface antiseptic'.⁹² Dr. Clayson commented, 'those submissions which obviously overstated the case more or less ruled themselves out. While such testimonies received proper attention the Committee was not in any way misled by them'.⁹³

Attention was, then, focused on the middle ground, upon the more moderate proposals which were received. The assessment of this evidence was approached in a rigorous and systematic fashion. The submissions were first circulated in advance of meetings with notes, including a summary and commentary from the Secretary to the Committee attached. These notes could be influential for they often pointed out strengths or weaknesses in the arguments presented. It was also within the power of the Secretary to draw the attention of members to other considerations such as the standing of the submitting organisation and the advisability of being seen to be giving due consideration to their opinions.

A number of examples illustrate this quite neatly. For instance, in dealing with a 'heavyweight' like the Church of Scotland, the Secretary advised that 'the Committee will no doubt wish to invite the Moral Welfare Committee to give oral evidence'.⁹⁴ While the decision rested with the Committee the astute use of language - 'will no doubt wish' - left the Committee in no doubt about the appropriate path. Similarly, with the Church of Scotland's counterparts the RC Bishops it was noted that the 'submission raises no fresh point of substance but the Committee may consider it politic to invite the Bishops to give oral evidence'.⁹⁵ Again, concerning whether the STUC

should be invited, it was suggested that 'it would seem desirable in view of the general standing of the STUC to do so'.⁹⁶ Finally, of the Scottish Standing Conference of Voluntary Youth Organisations the Secretary wrote, 'the Committee may agree that the Standing Conference, representing as it does 26 national voluntary youth organisations, should be invited to speak on this topic, if only to demonstrate that the voice of those involved with young people had been heard'.⁹⁷

The 'status' of the pressure group submitting evidence seems to have influenced members in different ways. Not only that but also their interpretation of how it affected the proceedings of the Committee generally. Mr. Menzies Campbell and Mr. John Kerr were emphatic that the status of an organisation had not affected the way in which the evidence was viewed and assessed, all the evidence being considered on its own merits. Mr. Campbell said that the Committee was sceptical of special status groups and were alert to particular biases.

'Although the Committee were open minded they "weren't mugs" and were alive to arguments which concealed ulterior motives. It wasn't too difficult to see propositions that were being put forward to justify other interests'.⁹⁸

Mr. Kerr remarked quite simply that 'the ground was covered very fully'.

Dr. John Sutherland though, felt that it was difficult to assess what was more influential - the status of a pressure group or the content of their submission. He thought in the majority of cases the quality of the submission was probably most important, but on some occasions status played its part. He gave the example of the Church of Scotland, who, he commented caustically, submitted 'twentyfoolscap pages - mostly on sin'. However, because of their importance it was necessary for the Committee 'to make the Church of Scotland feel that they had been listened to. It was important that the Committee should

not offend those who had submitted evidence'.⁹⁹

Dr. Clayson himself, put yet another point view since he believed that status did have an important influence in the Committee's analysis of evidence. He said, 'it was inevitable that major organisations would carry more weight. The weight of evidence was an important consideration and there was little doubt that certain bodies carried more weight than others'.¹⁰⁰ This was, however, not to deny the importance of the quality of the evidence. He continued, 'the presentation of the memo was extremely important and obviously one which presented clear arguments concisely using proper syntax and correct spelling made a greater impression than one which was lacking in these qualities'. He did not agree with the line espoused by Campbell and Kerr, emphasising that as far as oral evidence was concerned 'certain bodies had to be seen no matter what'.

Here we can see an example of how consultation is not always equitable since groups do not have uniform status, principal 'inside' groups being granted almost automatic consultative status. Dr. Clayson revealed, 'the Committee had to see the established Church. Likewise the Police, the Law Society and some youth organisations virtually chose themselves'. However, he confided that to a certain extent it had been an exercise in public relations since it was of the utmost importance that 'the consultation had to be seen to be done'.

The reconciliation of differences within the Committee had also evolved as part of the working philosophy. Only three issues proved controversial enough to warrant notes of dissent in the Report - Sunday opening; the minimum age for purchase and consumption; and the vicarious responsibility of the licensee. Whatever the differences of opinion on the other issues they proved to be bridgeable so that the vast majority of the recommendations made were unanimous. Despite the

unanimity, Dr. Clayson was quick to indicate that there had been no shortage of lively debate in his Committee. How had this unanimity been achieved?

From the evidence of the Committee members it would appear that decisions were reached in a very informal manner. Mr. Menzies Campbell, for example, found it difficult to convey the exact procedure by which the Committee came to a decision, indicating that 'it was just resolved to proceed in a particular way'. Similarly, Dr. Sutherland said decisions were reached 'by agreement - rather like approving minutes. There was an informal vote of a sort when the Chairman would ask if everyone was agreed upon an issue'. He emphasised however, that although procedure was informal, the Committee were well aware that they had a precise task to perform, so 'decisions were decisions and they were clearly formulated'. John Kerr's comments were in the same vein. He indicated that there were 'no major disagreements or stand up fights' so the Committee were able to reach a consensus on most issues. He was full of praise for Dr. Clayson, stating that 'he was a very good Chairman in that he was able to focus the discussion and resolve differences'.¹⁰¹

Much the same story was given by Dr. Clayson himself. He confirmed that issues tended to be resolved by 'interpretation of the mood of the Committee'. After a full debate of the matter in hand Dr. Clayson would sum up and indicate what majority opinion appeared to be. It was then put to the members that this was the view of the Committee and if there were no objections it was so recorded by the Secretary. There was no shorthand recording of the deliberations, as it was decided from the outset to adopt a non-attributive type of minute, only notes of dissent being recorded individually. As far as Dr. Clayson could remember, 'the Committee never took a vote - all the decisions were reached amicably'.

In assessing the evidence, in debating the strengths and weaknesses of arguments, and in reaching decisions, the liberal reforming values of the Committee as a whole and as individuals were certainly brought to bear as policy was developed. Yet does this not open up the Committee to the accusation that they might have pre-judged some of the issues? Not in as much as the recommendations of the Committee were rooted in the existing research evidence, from Canada, USA and Europe, and in the various statistics, on consumption, prevalence of alcoholism, death rates from cirrhosis of the liver, expenditure patterns and the like, that was made available to the Committee in the early stages of its deliberations. Dr. Clayson indicated that 'the Committee's policy of relaxation stemmed as much from the statistical material available as from the evidence which was presented'.

Thus, the fact that the liberal values of the Committee were consolidated early on into a 'working philosophy' gave them a framework, incorporating a number of theoretical ideas and concepts, against which to judge the substantive issues that were to appear before them.

IX. Public Participation and the Effectiveness of the Committee

Cartwright has written:

'By systematically taking evidence on a specific problem from almost anyone who wants to give it, these committees provide a unique opportunity for the views of the various interests in society to be injected efficiently into the decision-making process... In short ... departmental committees offer an illuminating case study of the mechanics of public participation in government'.¹⁰²

How successful did the Committee feel themselves to be in this respect? How did the pressure groups react? How effective, in fact, was the Committee?

The Committee members, perhaps not surprisingly, took a very favourable and optimistic view of the process. Dr. Sutherland, for example, thought that it was a 'sensible method' in that it gave various bodies ample notice to prepare, formulate and present their evidence. 'Can't see what else there could be', he opined. In a very similar vein, Menzies Campbell responded that he 'can't think of anything better'. He granted that the method adopted was certainly laborious but all possible interests had an opportunity to make submissions. Yet to a certain extent the method might have disadvantaged some people who perhaps found it difficult to put things 'down in black and white'. On the other hand public meetings were not really suited to tackling such a complex issue. They were more effective when the issue could be reduced to a single subject, which licensing could not. On the whole he thought that 'there was a good balance between efficiency and participation'.

John Kerr took a more cautious line, arguing that the participation in decision-making was 'marginal'. In the same manner as in politics, the pressure group personnel met by the Committee tended to be the activists. In effect what one got was 'their view of what their organisation thought public opinion to be'. For instance, he indicated that they did not get a lot of young people's views on the issues; instead what they got were adult views on what young people thought. In this way the Committee got 'a filtered view of public opinion'. However, he asked rhetorically, 'is there a better way?'.

Dr. Clayson tended to concur with this line. He commented that the procedure 'certainly gives the opportunity for participation, but whether that opportunity is taken is a different matter'. He illustrated this by saying that at the outset the Committee had advertised in a total of 24 Scottish newspapers asking for evidence from individuals

and groups but that it had met with little response. 'The majority don't bother - its left to a vocal minority', he remarked.

That said, it would appear that the bulk of the pressure groups who contributed had few difficulties in communicating their opinions to the Committee. The principal reason for this would seem to lie in the fact that specific invitations were issued to most of the organisations deemed to be relevant, while a general invitation to the public covered those other groups and individuals who felt inclined to comment. Being a Committee of the Scottish Office, and more specifically the SHHD, communication was directly with St. Andrew's House, Edinburgh. Since the vast majority of organisations submitting evidence were either wholly Scottish based or had Scottish branches, the problems concerning geographical distance did not arise, at least at this stage in the policy process.

With the exception of those submissions from 'national' organisations which were intended primarily for the Errol Committee all the representations were framed to take account of the Scottish legal idiom. Organisations were given a general framework within which to work but were free to make additional comments on specific issues as they wished. Internal decision-making within groups obviously varied between each organisation depending on its nature, size and structure, but there were many similarities among the more important contributors. The major trend in the well established organisations was to have the formulation of their evidence dealt with by a sub-committee of the main executive committee. Bodies such as ACPO(S), the E.I.S., the STB, the Scottish Council of the BMA, the Church of Scotland, the Free Church and the Brewers approached the issue in this manner. In some instances such as the E.I.S., the Scottish Council of the BMA and the Brewers, the 'sub-committee' consisted of a single individual responsible

for drafting the submission, while in others, like the STB and ACPO(S) a working party of several members tackled the problem. In the case of a body as well organised as the Church of Scotland a complete committee could be assigned to the subject, in this instance the Moral Welfare Committee.

However, in all cases the draft of the evidence written by the sub-committee had to be formally approved by the executive committee or equivalent governing body before the decisions reached by the sub-committee became official policy of that organisation. While the executive or equivalent retained the right of veto, it appeared in most cases to be largely theoretical since only rarely was the verdict of the sub-committee seriously challenged, due primarily to the more detailed knowledge of the subject acquired by the sub-committee in the course of its deliberations.

When dealing with social issues of this type which impinge upon the freedom of the individual, a Committee of enquiry can be a particularly useful vehicle for gauging public opinion. While not everyone chose to participate, for those who did, a formal channel of communication was available through which their views could be expressed.

However, one must bear in mind the point made by John Kerr, that the principal contributions came from a relatively small and elite set of politically active interest groups. Submissions were by no means accorded equal weight. In this respect the Committee was not always interested in obtaining new ideas, but with obtaining a sufficiently convincing range of opinion in order to legitimate particular recommendations.

The conclusion that one arrives at about the Clayson Committee is that as a committee it was procedurally orthodox but theoretically

innovative. The distinguishing feature of the Committee was its philosophical approach to its subject and its commitment to examine issues against a stated theoretical framework. Evidence was viewed from a position which was not value free, but which was an explicit and integral part of the approach. It did not fall into the pitfalls of Shonfield's 'pragmatic fallacy' since it utilised not only the evidence submitted to it, but also other research findings, and assessed the information available against a cogent set of concepts.

Being appointed by the Scottish Office it was autonomous in its operation and could therefore address the problems as they manifested themselves in Scotland. The 'Scottishness' of the Committee, that is the Scottish perspective, lay not so much in any procedural differences from English counterparts, although being based in Scotland eased communication between the Committee and Scottish pressure groups, but in its ability to appreciate social and cultural mores which were particular, and perhaps unique, to the country and environment in which it was operating.

The Committee was also very conscious of its own role in policy formulation and this was reflected on a number of occasions in the tactical decisions which appear throughout the Report. While never compromising on its basic principles the Committee was aware of the need to make its recommendations practical and, more importantly, politically acceptable, so as to facilitate the inclusion of those recommendations in workable legislation. This transition from Report to legislation will form the basis of the next chapter.

1. see G. B. Wilson, *Alcohol and the Nation*, London, Nicholson and Watson, 1940, Ch. 11.
2. *ibid*, cited at p. 117.
3. see A. J. P. Taylor, *English History 1914-45*, Oxford, OUP, 1965.
4. Scottish Health Education Unit, *Understanding Alcohol and Alcoholism in Scotland*, HMSO, 1976.
5. *Scottish Licensing Law*, First Report by the Committee appointed by the Secretary of State for Scotland, HMSO 1960, Cmd 1217, (First Guest Report).
6. *Scottish Licensing Law*, Second Report by the Committee appointed by the Secretary of State for Scotland, HMSO 1963, Cmd 2021, (Second Guest Report).
7. First Guest Report, p. 42, para. 123.
8. see for example, R. Wilkinson, *The Prevention of Drinking Problems: Alcohol control and Cultural Influences*, New York, OUP, 1970; J. Roebuck and R. Kessler, *The Etiology of Alcoholism: Constitutional Psychological and Sociological Approaches*, Springfield, Illinois, Thomas, 1974; G. Moser, *Problems and Programmes Related to Alcohol and Drug Dependence*, Geneva, WHO, 1974.
9. see J. O'Connor, *The Young Drinkers*, London, Tavistock, 1978.
10. cited in N. Longmate, *The Waterdrinkers: A History of Temperance*, London, Hamish Hamilton, 1968, at p. 15.
11. K. Mitchell, *The Drink Question*, London, Swan Sonnenschein, 1891, p. 12.
12. Longmate, *op. cit.*, cited at p. 194.
13. B. Harrison, *Drink and the Victorians*, London, Faber and Faber, 1971, p. 104.
14. Scottish Health Education Unit, *op. cit.*, p. 4.
15. M. Plant (ed), *Drinking and Problem Drinking*, London, Junction Books, 1982.; see also M. Plant, *Drinking Careers: Occupations, Drinking Habits and Drinking Problems*, London, Tavistock, 1979.
16. P. Wilson, 'Drinking Habits in the United Kingdom', *Population Trends*, Winter 1980, OPCS, London, HMSO, pp. 14-18.
17. Plant, *op. cit.*, *Drinking and Problem Drinking*, p. 108.
18. Interview with Mr. Gavin Reed, Director, Scottish and Newcastle Breweries Ltd., 30th September, 1980.

19. Report of the Departmental Committee on Scottish Licensing Law (Clayson Report), HMSO 1973, Cmd 5354.
20. The Monopolies Commission, A Report of the Supply of Beer, HMSO, 1969.
21. Clayson Report, Introduction, p. xvi.
22. Interview with Mr. Alick Buchanan-Smith, M.P., 26th November 1980.
23. H. of C. Parl. Deb., Vol. 808, col. 98 (Written Answer).
24. *ibid*, col. 92 (Written Answer).
25. Clayson Report, Introduction, p. xviii.
26. D. Donnison, 'Committees and Committeement', in M. Bulmer (ed) Social Research and Royal Commissions, London, Allen and Unwin, 1980, p. 9.
27. see C. Baur, 'Who Runs Scotland', The Scotsman, 11th-18th Sept. 1978.
28. Interview with Mr. Menzies Campbell, Member of Clayson Committee, 14th January 1981.
29. Interview with Dr. Christopher Clayson, Chairman of the Departmental Committee on Scottish Licensing Law, 4th March 1981.
30. Interview with Dr. John Sutherland, Member of Clayson Committee, 21st August 1980.
31. A. Buchanan-Smith, *op. cit.*
32. T. J. Cartwright, Royal Commissions and Departmental Committees in Britain, London, Hodder and Stoughton, 1975.
33. Interview with Mr. John Kerr, Member of Clayson Committee, 27th October 1980.
34. Cartwright, *op. cit.*, p. 64.
35. Clayson Report, Introduction, p. xv.
36. *ibid.*, p. 37; see also Report of the Departmental Committee on Liquor Licensing, HMSO 1972, Cmd 5154, p. 57 (Errol Report).
37. Clayson Report, p. 42.
38. A. Shonfield, 'In the Course of Investigation', New Society, 24th July 1969, p. 123.
39. Menzies Campbell, *op. cit.*
40. Co-operative Commission on the Study of Alcoholism, 'Alcohol Problems - A Report to the Nation, USA, 1967, cited in Clayson Report, p. 7.
41. Clayson Report, p. 8.
42. B. Walsh, Drinking in Ireland, Irish Economic and Social Research Institute 1980.

43. Scottish Health Education Unit, *op. cit.*
44. *ibid.*, p. 6.
45. Clayson Report, p. 13.
46. Memorandum from the Scottish Council of the British Medical Association, SLLC Evidence 77.
47. Memorandum from the Institute of Psychiatry, SLLC Evidence 39, p. 12.
48. Memorandum from the Royal College of Physicians of Edinburgh, SLLC Evidence 89, p. 8.
49. Clayson Report, Introduction, p. xix.
50. Report of the Moral Welfare Committee of the Church of Scotland, 1974, p. 676.
51. Clayson Report, p. 48.
52. *ibid.*, p. 48.
53. Memorandum from Association of Chief Police Officers (Scotland), SLLC Evidence 19, p. 5.
54. Letter from Mr. G. V. A. Perry, Company Secretary, Mecca Ltd., 12th November 1971, accompanying Memorandum from Mecca Ltd., SLLC Evidence 80.
55. Memorandum from the Licensing Law Reform Society, SLLC Evidence 10, July, 1971.
56. Clayson Report, p. 64.
57. *ibid.*, p. 65.
58. Memorandum from The Brewers' Association of Scotland, SLLC Evidence 17, 2nd August 1971, p. 3.
59. *ibid.*, p. 3.
60. Report of the Moral Welfare Committee of the Church of Scotland 1974, p. 667.
61. Memorandum from The Free Church of Scotland, SLLC Evidence 61.
62. Memorandum from The Congregational Union of Scotland, SLLC Evidence 60.
63. Memorandum from The Scottish Band of Hope Union, SLLC Evidence 63.
64. Memorandum from The Roman Catholic Bishops in Scotland, SLLC Evidence 67.
65. Mr. Gavin Reed, *op. cit.*
66. Interview with Mr. Alistair Mowat, Managing Director, Scottish and Newcastle Inns Ltd.
67. Report of the Moral Welfare Committee of the Church of Scotland, 1974, p. 672.

68. *ibid.*, p. 672.
69. Clayson Report, p. 108.
70. *ibid.*, p. 109.
71. *ibid.*, p. 110.
72. Interview with Dr. Clayson, *op. cit.*
73. *ibid.*
74. Noble v. Heatly, 1967 S.L.T. 26.
75. Memorandum from The Law Society of Scotland, SLLC Evidence 86, p. 5.
76. Report of the Moral Welfare Committee of the Church of Scotland
1974, p. 681.
77. Memorandum from the Roman Catholic Bishops in Scotland, SLLC
Evidence 67.
78. Memorandum from the Brewers' Association of Scotland, SLLC Evidence
17.
79. Clayson Report, p. 162.
80. Memorandum from the Association of Conservative Clubs, SLLC
Evidence 76.
81. Memorandum from ACPO(S), SLLC Evidence 19.
82. Memorandum from The National Association of Licensed House Managers,
SLLC Evidence 37.
83. Interview with Mr. Ridehalgh, Secretary of the Scottish Licensed
Trade Association, 25th August 1980.
84. Memorandum from The Scottish Standing Conference of Voluntary
Youth Organisations, SLLC Evidence 72.
85. Memorandum from The Working Party on Youth-at-Risk, SLLC Evidence
70.
86. Memorandum from The Educational Institute of Scotland, SLLC
Evidence 107.
87. Scottish Educational Journal, 2nd February 1972.
88. Oral Evidence to Clayson, 19th April 1972.
89. Clayson Report, p. 139.
90. Menzies Campbell, *op. cit.*
91. Clayson Report, p. 149.
92. Evidence from the public, SLLC Evidence 30, D(7).
93. Dr. Christopher Clayson, The Role of Licensing Law in Limiting
the Misuse of Alcohol, in G. Edwards and M. Grant, Alcoholism:
New Knowledge and New Responses, London, Croom Helm, 1977.
94. Secretary's Notes, SLLC Evidence 66.

95. Secretary's Notes, SLIC Evidence 67.
96. Secretary's Notes, SLIC Evidence 90.
97. Secretary's Notes, SLIC Evidence 72.
98. Interview with Mr. Menzies Campbell, *op. cit.*
99. Interview with Dr. John Sutherland, *op. cit.*
100. Interview with Dr. Christopher Clayson, *op. cit.*
101. Interview with Mr. John Kerr, *op. cit.*
102. Cartwright, *op. cit.*, p. 126.

CHAPTER 6

The Formulation of the Licensing (Scotland) Act 1976

I. Introduction

The Clayson Report, which formed the basis of the last chapter, was published in August 1973. The Licensing (Scotland) Act was passed in November 1976. The transition from the Report's policy recommendations to a concrete legislative enactment constitutes the concern of this chapter.

Section II considers the initial reaction to the Report - both from the public and from the Government. After a period of formal consultations between the Government and interested parties on the content of a Report, it is ultimately the Government which decides the fate of a Report - whether it is to be shelved, discussed or acted upon. Thus, in the same way as the Committee acted as a regulator of demands in producing the Report, the Report itself became the object of demand regulation as it competed for attention and a place on the political agenda.

Section III examines the pre-legislative activity surrounding the Clayson Report in 1974 and 1975. At the heart of the matter during this period was the accusation that consideration of the Report was subject to an unnecessary delay. Different protagonists to the debate adopted different perspectives as to what constituted 'delay'. This section tries to disentangle some of the arguments and values involved in an attempt to shed some light on the actors' 'assumptive worlds'.

Section IV briefly outlines the Government's commitment to legislate and notes the differences between the Government's legislative proposals and the recommendations of the Clayson Report. At this stage, with the issue on the legislative agenda, pressure group

activity became more observable and further examples of the virtual automatic consultation of established groups by Government are highlighted.

Section V examines in some detail the Licensing Bill as it progressed through Parliament. It focuses upon how some of the more important decisions were arrived at and looks at the way in which pressure group activity and the values of MPs influenced those decisions.

Before making some concluding remarks, Section VI considers briefly the implementation of the 1976 Act and observes the novel interpretation of Section 64 concerning regular extensions of hours through which the 'all day pub' has come about in Scotland. It then records some early assessments of the operation of the new Act which cautiously suggest that the more relaxed law can be deemed a reasonable success.

II. The Initial Reaction to the Clayson Report

The Report of the Departmental Committee on Scottish Licensing Law was published in August 1973 and reaction to it was as varied as the submissions themselves had been. Generally, those organisations that had advocated liberal reforms welcomed it while those who had sought the maintenance of restrictive controls were disappointed by its recommendations. Bodies that one would expect, such as the Brewers, the Scottish Licensed Trade Association, The Scottish Tourist Board, the Association of Chief Police Officers (Scotland), the Scottish Health Education Unit and the Law Society of Scotland, all favoured the Report. The Brewers thought that Dr. Clayson, to his credit, had taken a 'responsible attitude' and commented that 'the Report was a heaven sent opportunity for reform'. They were 'amazed

and delighted by Clayson'.¹ ACPO(S) felt that 'the Clayson Report was an enlightened and important document'.² The Scottish Health Education Unit also welcomed the recommendation for more liberal and relaxed licensing hours and stated that 'it was one of the few things the Group and the Brewers actually saw eye to eye on'.³ The Law Society for their part were 'quite happy with the Report and saw no reason to comment'.⁴

In a similarly predictable way the principal opposition to the Report's proposals came from the Churches and temperance organisations. Leading the attack was the Church of Scotland whose Moral Welfare Committee criticised the Report for underestimating the importance of licensing as a regulatory factor in liquor control.⁵ Not surprisingly the Church disagreed 'vehemently' with the proposed discretionary opening of public houses on Sundays.

The United Free Church also made its criticisms known at the time. While commending Dr. Clayson 'on a thorough review of Scottish Licensing Law' they nevertheless expressed 'strong disapproval of many of the conclusions and recommendations'.⁶ Likewise, the Association of Christian Teachers thought that 'an increase in licensing hours only adds strength to the supposition that the consumption of alcohol is the socially accepted norm'.⁷

Thus, in much the same way as there had been extremes of opinion in the evidence itself, there were corresponding extremes of opinion about the Report which ranged across a broad spectrum from 'delight' to 'vehement opposition'. The 'Glasgow Herald' of 12th October 1973 reported the controversy over the reform of Scotland's licensing laws in a leader entitled 'Two views on licensing'.⁸ This controversy was symbolised by the conflicting views expressed by the Church of Scotland's Moral Welfare Committee and the Lord Provost's Committee

of Edinburgh Corporation. The 'Herald' commented:

'Licensing reform is long overdue, and the Lord Provost's committee rightly intend to urge the Secretary of State for Scotland to implement the recommendations of the Clayson Committee. While the Kirk have good reason to be concerned about chronic misuse of alcohol in Scotland, they are wrong to assert that Clayson does not sufficiently reflect the gravity of this problem'.⁹

The procedure for submitting views on the Report was again formalised. The Secretary of State invited views to be submitted on the Committee's recommendations in general and on any specific recommendations which affected particular interests. The submissions were to be made to the Scottish Office by the 30th November 1973 which allowed approximately four months to receive all relevant comments.

From the evidence available it would appear that the general tendency was for organisations to argue much the same line as before, simply highlighting points with which they agreed or disagreed. In this respect there seemed to be a greater onus on organisations disagreeing with the Report to express their views of discontent than for organisations agreeing with the recommendations to express approval. Those who favoured liberalisation and relaxation of the laws were, naturally, sympathetic to the Report's recommendations and seemed content to note that their opinions had been acknowledged and recorded, and indeed in many instances confirmed. Thus, many of the organisations whose opinions the Report had endorsed no longer felt the need to make any further statement or take any further part in the process.

By the end of 1973 formal consultations between the Scottish Office and pressure groups had come to a close. It was over two and a half years since the Committee had been appointed. The Report had been published and the initial reaction assessed. At this juncture the fate of any committee report lies in the balance. Will it be

shelved after all the time and public money that has been spent to arrive at a conclusion? Or will some of its recommendations be implemented through a statutory enactment? If some recommendations are to be implemented how long will they take to become legislation and in what form will they appear? The answers to these questions are political decisions which are outwith the control of the committee itself. As Cartwright has noted:

'The difficulty is that the effects of a committee's recommendations do not lie wholly or even largely in its own hands. There are some tactics and devices which a committee may use to help "sell" their recommendations, but their effectiveness still depends on a great many factors beyond its control and even beyond its power of influence. Royal commissions and departmental committees are above all advisory committees. They have no powers of execution. The fate of their recommendations lie in hands other than their own'.¹⁰

Whatever a committee may recommend it is still Government which governs. In Chapter 2 it was noted that Government has 'officiality', 'legitimacy', and 'authority' which enables it to regulate demands on the political agenda. Thus, a government has discretion in its treatment of committee reports and recommendations. A committee report, therefore, must compete for that scarcest of political resources - time. In this respect its fate is dependent on which demands are given priority and how the political agenda is set. This in turn can be dependent upon the predispositions of those who are in a position to set that agenda. Their values can affect whether a report is taken up or even discussed at all. This chapter, then, will try to explore empirically some of the themes outlined in Chapter 2, especially the underlying one that policy making is both an intellectual activity and an institutional process.

III. Pre-legislative Activity 1974-75

The Clayson Report was published in August 1973, but it was not until April 1975 that Parliament, in the form of the Scottish Grand Committee, debated its findings. Given the time allowed for formal consultations after publication, this left a period of some 18 months before the Report was considered. Did this period constitute an unnecessary delay or was it an appropriate response under the circumstances?

One of those who felt most strongly that there had been a delay in acting upon the Report was J. P. Mackintosh (Lab. Berwick and E. Lothian) who argued in the Scottish Grand Committee that too long a delay would render any legislation outdated by the time it was implemented because of rapidly changing social customs. He commented, 'I hope no one will suggest that this is a question of parliamentary time, because I feel that being told continually that we have no time for divorce reform, for law reform, for licensing reform in the present legislative framework constitutes a powerful argument that the legislative framework for Scottish Affairs is not adequate'.¹¹

The Government Front Bench, however, strongly rejected any criticism of delay. Harry Ewing (Under Secretary of State at the Scottish Office) responded:

'I reject at the outset ... the charge ... that the Government have been too slow to act on the Clayson Report. Those who make the charge fail to appreciate the difficulties that this Government have been faced with since the Report was published in August 1973. All politicians in Scotland spent the major part of 1974 fighting elections, and I am sure that the Clayson Committee Report was furthest from their minds during practically the whole of 1974'.¹²

All things taken into account this seems a plausible enough explanation. The remaining months of 1973 were taken up with formal consultation and virtually the whole of 1974 comprised only urgent legislative

activity. As noted in Chapter 1, the Conservative Government fell in early 1974 to be replaced by Harold Wilson's Labour Government in the February. This administration had little time to do anything except to deal with the most pressing economic matters until the second election was called later in the year. That the Clayson Report came up for debate in the Scottish Grand Committee in April 1975, within the first six months of the first legislative session of the October administration does not seem unreasonable under the circumstances.

The general feeling of the debate in the Scottish Grand Committee in the spring of 1975 was that the Clayson Report should be welcomed as an important document. Secretary of State for Scotland, Willie Ross, gave the Report a lukewarm endorsement in so far as he agreed that licensing, in itself, could only play a limited part in controlling alcohol abuse, but he expressed reservations over a number of specific recommendations such as the Sunday opening of pubs and the abolition of the afternoon break. The opposition spokesman, Alick Buchanan-Smith (Cons. N. Angus and Mearns) viewed Clayson more favourably and urged speedy reform, but warned that the fact that the issue was being debated in the Scottish Grand Committee had raised expectations among the people of Scotland. He warned:

'If these expectations are dashed, if action or legislation does not follow this debate, it will simply encourage a growing feeling of cynicism among many people in Scotland about the functions of this Committee and what we are doing in relation to a matter which has caused wide public concern'.¹³

In the same vein David Steel (Lib. Roxburgh, Selkirk and Peebles) urged prompt action. He noted that the Committee had sat for two years and its Report had been published some 18 months. Despite being a controversial subject, legislation ought to be introduced 'at an early date'. His concern was that the Government should not shuffle it off

until such a time as there was a Scottish Assembly.

The Press too urged prompt legislative action. 'The Scotsman' for instance, commented after this debate that it would be a 'tragedy' to shelve the Clayson Report,¹⁴ while the Daily Record informed its readership that 'Willie keeps brakes on Clayson'.¹⁵

The SGC debate, then, was an opportunity to give the Report a formal public airing for the first time since its publication. During this 18 month period between publication and the SGC debate there appears to have been little pressure group activity. This was perhaps not surprising given the circumstances of the electoral upheaval of 1974. What activity there was seems to have been divided along the established battlelines of an anti-relaxation lobby and a pro-relaxation lobby. The Church of Scotland, as noted earlier, made representations to the SHHD immediately after Clayson published, but thereafter appears to have adopted a rather passive role. For the pro-relaxation lobby the SLTA seems to have been much more active, their Secretary revealing that 'there was a constant dialogue with the SHHD'.¹⁶ Mr. Ridehalgh, the SLTA Secretary, was particularly concerned that the Report should not be shelved so there was some lobbying by the Association 'to try to get things moving'. He commented that 'one only has to look at Errol on which no action was taken to see how Reports can be shelved'.¹⁷

A spokesman for the Brewers suggested that the SLTA and also the Scottish Tourist Board had been important in lobbying, but indicated that the Brewers themselves had not been that active. He remarked, off the cuff, 'In any case, Labour Government don't tend to listen to Brewers'.¹⁸ This perhaps reveals something about the brewing industry's sensitivity towards its own image.

Dr. Clayson himself adopted quite an active role during this period. John Kerr revealed that 'Clayson did an immense amount of

campaigning to keep the Report alive'.¹⁹ This campaigning was conducted largely through the media. Although there were no formal contacts with Ministers, Dr. Clayson did have some contact with MPs. They would usually be seeking clarification on particular points and he would deal with these queries through private correspondence. He also accepted invitations from broadcasting authorities to comment. Later he was to express his regret at having participated in these 'rather unsatisfactory affairs'. The problem lay in the time he was allocated to put over his case. Instead of having sufficient time to develop an argument he felt he was forced into 'the two-minute syndrome'. Being restrained by this format Dr. Clayson was uncertain whether these broadcasts helped or not. He also utilised the press by writing some articles for the 'Glasgow Herald' and the 'Sunday Mail'. The theme of these articles was the same. His article for the Herald appeared under the headline 'Outlook grim unless Scottish drinking laws are reformed',²⁰ while his feature in the 'Sunday Mail' appeared as 'My nightmare for the 1980s: Clayson hands out a warning'.²¹ He was later to reflect on press coverage and comment, 'The Sunday Mail kept the pot boiling, but whether this accelerated progress in any way is uncertain'.²²

One person who confirmed the media was of importance was Harry Ewing, the Scottish Office Minister in charge of the licensing issue. He said that 'the media had a tremendous influence' and spoke of the 'Sunday Mail' in particular. Typical of the 'Sunday Mail's' line was its comment in December 1974 that since its publication in August 1973 the Clayson Report 'has been gathering dust in a Government office. It has been ignored by politicians, shuffled by civil servants and almost forgotten by the public'.²³

Morag Faulds, Director of Social Work for Inverness-shire and Member of the Clayson Committee, held a similar view in April 1975. Speaking at a conference on alcoholism a few days before the scheduled Scottish Grand Committee debate, she was reported in 'The Scotsman' as saying, 'it is time our legislators recognised the urgency of the problem. Are they (the Clayson recommendations) doomed to eternal relegation in the vaults of St. Andrew's House'.²⁴ Only John Kerr was to support her in this view. He felt that there had been a 'resistance among civil servants in the Scottish Office, especially in the higher echelons'.²⁵

However, others on the Committee were not so critical. Menzies Campbell thought that no one on the Committee could have objected to the subsequent handling of the Report. In fact, he did not know of any comparable report which had been dealt with as quickly. Dr. Clayson also felt in retrospect that 'the government acted with creditable speed'. He said that 'there was a lot of apprehension at the time on account of the two general elections'. Parliament could not therefore be blamed for the timetable. He could, however, blame them 'for what they did to the Report, but not for the timetable'.²⁶

MPs also thought that the Report was dealt with promptly. Bruce Millan, Minister of State and subsequently Secretary of State at the Scottish Office, indicated that 'a lot of work had to be done before the Bill appeared'. It was then a question of finding parliamentary time. He did not accept that there was any delay and pointed out that 'lots of reports never see the light of day'.²⁷ Much the same story was told by Robin Cook (Lab. Edinburgh Central) who thought that the time before legislation appeared was reasonable. 'It was a very long Bill as Scots' Bills go and it was in a highly technical legal area. Drafting it would require twelve months at least - let alone any

political judgement'.²⁸ He said that the question one must put to those who said there was a delay was what piece of legislation they would have left out in 1975 to allow a licensing Bill to go through. Given that 1975-76 was only the second parliamentary session of the Labour Government, he thought they had done extremely well to have dealt with it as quickly as they did. He indicated that there was some doubt as to whether the Bill would actually be ready in time to present to Parliament in the Easter of 1976. 'That it was ready was thanks to Harry Ewing who worked very hard to get the Bill finalised'.²⁹

Harry Ewing himself, suggested that the Report was acted upon more quickly than any other major report he could think of. 'It was a remarkable achievement that the Government enacted most of the Report's main recommendations within three years. The Report was published in late '73 and by late '76 the Act was on the statute book. The Government had certainly not adopted any delaying tactics'.³⁰ He felt the achievement to be all the more remarkable when it was remembered that Willie Ross was Secretary of State at the time. Willie Ross had very strong and definite views on drink and on some of the more controversial recommendations he 'had to fight tooth and nail with Willie to get them through'.³¹

All the indications are then, that the licensing issue proceeded at a reasonable pace given the circumstances that prevailed at the time. Omitting 1974 as a year confined to urgent legislative activity because of the two general elections, the issue came up for debate in the spring of 1975, followed by a commitment to legislate in the new Parliamentary session later in the year. It seems unlikely that the Conservative administration of the early 70s could have introduced legislation any quicker had their term of office run its full course, since it most probably would have been looking to go to the country

in late 1974 or early 1975 in any case, leaving little time for a Scottish Bill of such detail. Information obtained from the Law Society of Scotland suggests that the Conservative administration had little intention of moving quickly on the issue anyway. The Law Society were informed by the Government in late 1973 that 'nothing would be happening on the issue in the near future'.³² This leads to the conclusion that even if the Conservatives had been able to retain office it is unlikely that legislation would have appeared any sooner because it seems as though they intended leaving the issue until they had secured a second term of office.

IV. The Commitment to Legislate

The statement to the House that the Government was preparing legislation on licensing law was made by Willie Ross on 28th October 1975. The proposals that he outlined differed in some important respects from the recommendations made by Dr. Clayson. Although there was an endorsement of the extension of hours to 11 p.m., the introduction of the new experimental 'refreshment' and 'entertainment' licences, the abolition of temperance polls and the creation of new licensing authorities, there was considerable divergence on a number of issues with no opening of public houses on a Sunday, retention of the statutory afternoon break and the closing of off-sales at 8 p.m.

The following day press reaction was unfavourable. The 'Daily Record' ran a front page banner headline saying 'Short Measure, Willie!'.³³ The paper reported that the Scottish Secretary had 'clanged the bell firmly against Sunday opening of pubs'. It queried 'Why these unique Scottish restrictions on Sunday pub-drinking? Why should our laws be so different from those in England?'. The 'Record's' verdict was simple - 'Short measure, we say'. The 'Scottish Daily

News' also reported 'Sunday pub drinking out', but commented only that 'as expected, Mr. Ross has ruled out Sunday pub opening in Scotland - although this was recommended by the Clayson Report'.³⁴ Indeed, only a few weeks earlier a System Three Scotland poll commissioned by the 'Glasgow Herald' had shown that a majority wanted pubs to be open on a Sunday - 54% were in favour, 44% against and 3% did not know.³⁵

However, the issue was now on the legislative agenda and pressure group activity was to become more observable. At this period in late 1975 there were consultations between the Scottish Home and Health Department, with its responsibility for licensing, and established organisations. A memorandum prepared by the SHHD relating to the Government's proposals for the reform of the licensing laws was circulated to a number of bodies such as the Law Society of Scotland, ACPO(S), COSLA, the Church of Scotland and the SLTA. The responses of these organisations were, not surprisingly, very much in keeping with their previously stated positions. The Church of Scotland, for instance, was concerned about the idea of a refreshment house licence on the grounds that 'present Scottish attitudes cannot cope with this development'.³⁶ On the other hand, Dundee District Council expressed disappointment 'that all the recommendations of the Clayson Committee would not be implemented' and through COSLA urged that strong representations be made 'for the implementation of the remaining recommendations'.³⁷

The lines of communication between interested groups and the SHHD appear to have operated with reasonable efficiency, at least for those organisations which were already an established part of the consultation process. Officials of the Law Society of Scotland met with Scottish Office Ministers and officials on several occasions to discuss details of the legislative drafting. Similarly, representatives

of such bodies as the Church and the SLTA also had meetings. Only ACPO(S) had the reservation that government communication was sometimes lax. The problem, according to one senior police officer, was that 'the SHHD would occasionally send proposals for comment and expect a reply yesterday!'.³⁸ He described this process as the 'pressure of preference' by which he meant that ACPO(S) were often sent a brief of possible legislative options and were simply asked to state their preference as quickly as possible in order to facilitate the progress of legislation. ACPO(S), he indicated, were aware of the reasons for this which concerned parliamentary timetabling. He emphasised though, that the Association had always responded to any requests made of it concerning legislative proposals and where any hold-ups or breakdown in communication had occurred it had always been at the SHHD end!

Here then, we see examples of established organisations which are virtually automatically consulted by government on issues considered relevant to them. These groups expected to be consulted. Their position and status in Scottish society was such that they were more or less guaranteed the ear of the Scottish Office. Organisations with such power do not therefore conform to the image of the struggling pressure group battling against the government to have its opinions heard and acted upon. Rather they are part of the legislative machinery itself and come to expect 'an active involvement in the content of Scottish legislation'.³⁹ One of the ironies of this situation is that, on occasions, instead of applying pressure on the government for action, they themselves can be pressurised by government for quick responses to particular legislative options.

Within the Scottish Office in late 1975 there seems to have been a rather novel method of dealing with the licensing issue. According

to Harry Ewing, the Minister in charge, what happened was that all the main recommendations of the Clayson Report were listed in a memorandum which was then circulated amongst all the Scottish Office Ministers who were asked for their opinions. This was not the usual procedure since normally matters are dealt with only by the Minister concerned. However, on this occasion because the issue was felt to be so wide ranging everyone was asked for their thoughts. Where they all agreed on a recommendation that recommendation was certain to go into the legislative draft. Where there was a difference of opinion there were further consultations which would usually result in some modification of the recommendation.

Certainly, the influence of the then Secretary of State, Willie Ross, was prominent in the overall shaping of the legislation. 'The shape of the Bill was very much influenced by Willie Ross', said Robin Cook. 'What one had to remember was that Willie had very strong views on drink so that Sunday opening would be an anathema to him'.⁴⁰ Even although Bruce Millan was to replace him as Secretary of State in the Cabinet reshuffle following Wilson's retirement in March 1976, the main principles of the Bill were already there and 'the die was cast'. Another Labour MP, Neil Carmichael (Glasgow, Kelvinside) remarked that 'as far as Sunday opening was concerned, Willie thought things were alright as they were, whereas Bruce, perhaps intellectually felt Clayson to be right, but thought the climate in Scotland was not ready for such a change'.⁴¹

Dr. Clayson also felt the Scottish Office were over cautious in their approach to the reform. He pointed out that 'the recommendations were in a sequence and once that sequence was broken things became a little chaotic'.⁴² He related the story of the time he had been involved in a radio broadcast debate with the Minister concerned,

Harry Ewing. In it he had put to Harry Ewing this argument that it was important that the package of recommendations be implemented otherwise the sequence would be broken and the underlying philosophy of the Report lost. However, he was informed by Harry Ewing that never in parliamentary history had a Departmental Report been enacted in its entirety and 'Dr. Clayson need not suppose that his will be the first to be so honoured'.⁴³ Dr. Clayson said that he thought that remark to have been very revealing about the government's attitude to the issue.

He was particularly disappointed that his recommendation on children's certificates was omitted and not even debated. It was Willie Ross who condemned it as not being in accordance with Scottish drinking conditions. Ross missed the point completely, said Dr. Clayson, since the idea of the children's certificates was to change those traditions. 'Such was his weight that he effectively killed that provision dead', he reflected.⁴⁴

Another area where Willie Ross was influential in modifying a recommendation concerned the provisions for off-sales. The original recommendation was for off-sales to be open from 8 a.m. to 11 p.m. However, Willie Ross cut this back to 8 p.m. In a letter to the Church of Scotland, a Scottish Office civil servant wrote that 'the Secretary of State believes that his proposal that off-sales premises should close at 8 p.m. might help to reduce one of the Scottish drinking practices that he would like to see altered - that is the buying of alcohol at a late hour for consumption in their own homes by people who have already been drinking heavily'.⁴⁵

The influence of Willie Ross in the licensing issue needs to be differentiated into two separate spheres - one concerning the parliamentary timing of the legislation and the other concerning the content

of that legislation. Although critics have condemned Ross for 'delaying' legislative action on the recommendations of the Clayson Report, there seems little hard evidence to support the accusation. If the period of time between the publication of the Report and the issue appearing on the legislative agenda can be said to constitute a 'delay', then there are other more plausible reasons to account for it. So it is perhaps misleading to portray Willie Ross as the puritan ogre hostile to reform. In fact a number of his statements in the House suggest that he saw considerable merit in a great deal of the Clayson Report. However, where his Calvinist ethics were without doubt influential was in shaping the content of the legislation. There were a number of recommendations which he believed went much too far in liberalising the law and to which he objected as being against the interests of the Scottish people. The inclusion of these in any Scottish Licensing Bill he opposed vehemently. His concern then, was focused on the type of reform that was desirable rather than on the principle of reform itself. And it was in this capacity that his strong Calvinist conviction manifested itself most profoundly.

V. The Bill in Parliament

The Licensing (Scotland) Bill was finally presented and read a First time by Willie Ross on 23rd March 1976 and was referred to the Scottish Grand Committee for Consideration of Principle the following day. It came before the SGC, which met for one sitting, on 6th April.

Harry Ewing introduced the debate, explaining the reasons for the rejection of some of Clayson's main recommendations. Although the Government accepted the argument that inadequate social controls, that is a lack of sensible attitudes to alcohol consumption, made drink an especially serious problem in Scotland, they were not

convinced that legislative controls in the form of licensing played as limited a part in the regulation of alcohol abuse as was suggested by the Clayson Report. Accordingly, the government avoided any proposals which would be likely to result in a substantial increase in total consumption. In their view some of the Clayson proposals risked that result, particularly the recommendation for the opening of pubs on Sundays. However, they were also aware of the need to modernise the law to meet changing social circumstances.

The reason given for not implementing a number of the more radical recommendations, Sunday opening in particular, was that they could lead to a substantial increase in consumption. The Clayson Report, though, had already conceded that any relaxation which led to an unacceptable increase in consumption and a corresponding increase in misuse would constitute an argument against relaxation. However, the Report pointed out that 'if, as there is reason to believe, the attributable increase in consumption is likely to be slight, the argument must be weighed in the balance against those which suggest that relaxation is desirable'.⁴⁶ The basis of the Clayson philosophy was that any increase in consumption which might result from relaxation, provided it was reasonable, would be overshadowed by the benefits achieved in reducing the pace of drinking by creating more civilised social attitudes and drinking habits. However, the rejection of the proposal for Sunday opening would appear to be more attributable to the religious scruples of Willie Ross and his concern for the traditional qualities of the Scottish Sabbath, than to any logical argument about increased misuse because of the Sunday opening of public houses.

The Opposition spokesman, Alick Buchanan-Smith was quick to point out that the Government was taking too short term a view since the idea of Clayson was that the Report had to be looked at as a whole

rather than a series of individual recommendations. He urged that they 'should try to anticipate, and not simply react to shorter term pressures'.⁴⁷ It was thought that these pressures emanated from the religious community. Yet the irony was that while the views of the Church of Scotland were influential they did not undertake a great deal of active representation over the issue. Since Willie Ross was sympathetic to the Church's line, and Sunday opening was omitted from the original Bill, the Church simply did not see a need to make any representation at that time. In fact Alick Buchanan-Smith commented, 'it is the Calvinism of the right hon. Member for Kilmarnock that is behind this rather than any reasoned body of opinion'.⁴⁸

The limited vision of the Scottish Office was further criticised by Dennis Canavan (Lab. West Stirlingshire) who argued that since it was some two and a half years since Clayson reported, the question arose as to whether the public's attitude in Scotland with regard to licensing and public customs had changed to a degree where perhaps even the Clayson recommendations, which were more radical than those contained in the legislation, were not slightly out of date. He emphasised the need to have a greater degree of self discipline on the part of the individual rather than an external discipline imposed by legislation.

On that note the Consideration of Principle was duly reported to the House the following day and from there was committed to the First Scottish Standing Committee. The Standing Committee was to have its first meeting on 18th May and was to sit throughout May and June, having a total of fourteen sittings.⁴⁹ The clause by clause debate was extremely detailed with hundreds of amendments coming before the Committee. There was much repetition of arguments which have previously arisen elsewhere and a large part of the debate revolved around the more

technical provisions within the Bill and around the linguistic intricacies of parliamentary drafting. In order to avoid this minutiae, the analysis of decisions within the Standing Committee will be confined, as far as possible, to the main issues as they were enunciated in the previous chapter.

For most of the early sittings the debate was confined to technical provisions concerning the operation of the licensing boards. Of interest in the early debate was Clause 2, although not for its subject - 'The Disqualification of Interested Persons' - but for the way it illustrated the Scottish Office consultation procedure and its effect on legislation. Harry Ewing asked if a particular matter could be returned to 'once our discussions and considerations have been completed'.⁵⁰ This request ruffled the feathers of Mr. Michael Clark Hutchison (Cons. Edinburgh South). Mr. Hutchison took a dim view of the fact that a Bill had been presented to Committee which was not in its final form - 'We are told something may happen on Report as a result of discussions with outside bodies. This is not the way to do business. There has been a breakdown somewhere in the Scottish Office on the arrangements. The Bill should not have come to the Committee until it was in its final form, with no ifs and buts and possible alterations by the Government later'.⁵¹ Harry Ewing, informed him that the representations in question 'were not made to us before the legislation was published, but afterwards, and we are considering them'.⁵² He explained further that a number of Government amendments 'openly and honestly have their origin against the background of the discussions we have had with various organisations'.⁵³

This brief exchange is illustrative of the manner in which Government continues to have consultations with, and be influenced by, outside organisations. Dialogue between Government and various

interest groups does not end when legislation appears. In fact, in many cases that is when the real lobbying begins. It is, in essence, the very stuff of which pressure group politics are made. In this light it is difficult to see why Clark Hutchison should become so disturbed by a situation which is an accepted and almost ritualised part of parliamentary activity and of the policy process.

The area which attracted most public interest, and which also provided one of the most novel illustrations of pressure group lobbying, was the issue of permitted hours generally, and the Sunday opening of public houses specifically. The controversy focused on the principle of whether public houses should have the legal right to open on a Sunday. It will be remembered that the original Bill omitted any provision for the Sunday opening of pubs for reasons outlined earlier. The Bill then, as it came before Parliament, allowed for pubs to open on weekdays from 11 a.m. to 2.30 p.m. and 5 p.m. to 11 p.m. with no opening on Sundays, while hotels and clubs could open 11 a.m. to 2.30 p.m. and 5 p.m. to 11 p.m. on weekdays and from 12.30 p.m. to 2.30 p.m. and 6.30 p.m. to 11 p.m. on Sundays. These times incorporated Clayson's recommendation for an additional hour opening in the evening, but rejected the all day and Sunday recommendations. The debate in Committee was to centre around the plethora of amendments which sought to have these provisions included in the legislation.

The case for Sunday opening was put principally by Malcolm Rifkind (Cons. Edinburgh Pentlands). There were three main themes to his argument. The first was that while a substantial number of people considered Sunday to be a day of rest and recreation, it was not necessarily incompatible with those objectives that pubs should be available as one means of recreation for those who wished to use them. Secondly, it was illogical to perpetuate a system whereby anyone who

wished to do so could obtain alcoholic liquor in a hotel, but not in a public house. Amongst other things such a situation tended to result in problems of overcrowding and damage to amenity in those areas where hotels were concentrated. Thirdly, the existence of permitted hours on a Sunday in other parts of the UK had not led to any serious problems of the type that was being suggested would occur in Scotland if a Sunday opening amendment was accepted. Sunday opening, he suggested, 'would create a more rational, sensible and responsible approach to licensing'.⁵⁴

The chief opponent to any proposed relaxation was Teddy Taylor (Cons. Glasgow Cathcart). He was saddened by the fact that the creation of one legal anomaly after another had put Scotland on the 'slippery slope' to unrestricted access to drink, and he could not see how an extension of hours would do anything to reduce Scotland's 'special problems of alcoholism and heavy drinking'. The argument that he espoused most vociferously though, concerned the protection of traditional qualities of the Scottish Sabbath:

'I take the view that it would undoubtedly change the character of our way of life, and cause a great deal of offence to a large number of people, if drinking on Sundays and public houses open on a Sunday became part of our way of life, unless we were to change the pubs themselves ... The moment provision is made for public houses to be open on Sundays, the whole character of the community will inevitably change along with the whole character of Sunday in that community'.⁵⁵

A cast of supporting actors also made contributions to the debate, the most worthy of consideration probably being Robin Cook's. He recognised that there was a serious and legitimate argument based on the individual's liberty to be able to choose when, where and how he drinks. However, the risk of increased consumption, because of the more relaxed hours, leading to the possibility of an increase in the

incidence of drink related problems was too great, given the inadequate facilities which existed in Scotland for treating alcoholism.

The Government response came from Harry Ewing who attempted to persuade the Committee that Sunday opening was not such a good idea. His case rested on four points. Firstly, using material extracted from 'The Sunday Mail Pub Spy Column', he suggested that given the unsatisfactory state of some of Scotland's hostelries they did not warrant being open on a Sunday. Secondly, letters from the public were limited - 'no more than about 60' - and inconclusive, the views expressed being split evenly. Thirdly, admissions for alcoholism and alcohol psychosis had increased dramatically between the late 50s and early 70s. Fourthly, the opening of pubs on Sundays would involve additional nuisance and loss of amenity for those living in close proximity to premises. For these reasons he recommended the Committee to reject the amendment. However, much to the chagrin of the Government, Harry Ewing's exhortations went unheeded because the Committee divided 10 votes to 6 in favour of the amendment (Table 6.1).

TABLE 6.1 House of Commons Parliamentary Debate, First Scottish Standing Committee, 18th May - 1st July 1976, col.488.

Ayes	Noes
Buchanan-Smith, Alick (Cons.)	Buchanan, Richard (Lab.)
Craigen, J. M. (Lab.)	Campbell, Ian (Lab.)
Douglas-Hamilton, Lord James (Cons.)	Cook, Robin, F. (Lab.)
Gilmour, Sir John (Cons.)	Ewing, Harry (Lab.)
Hutchison, Michael, Clark (Cons.)	Hamilton, James (Lab.)
McMillan, Tom (Lab.)	Taylor, Teddy (Cons.)
Monro, Hector (Cons.)	
Rifkind, Malcolm (Cons.)	
Watt, Hamish (SNP)	
White, James (Lab.)	

This Division shows that Conservative Members were more favourably disposed towards reform than were Labour Members. 6 Conservatives

compared to only 3 Labour voted in favour of the Sunday opening of pubs, while only 1 Conservative and 5 Labour voted against. The corresponding Division on the Sunday opening of pubs at the Report Stage will also reveal that Conservatives were generally less reserved in their attitudes towards liberalisation.

This important decision to incorporate Sunday opening in the legislation was taken on 17th June, and within days there was activity to have it reversed. The Church of Scotland, previously conspicuous by its absence, immediately swung into action. On 21st June, the General Secretary, Rev. L. Beattie Garden, wrote on behalf of the Department of Social Responsibility of the Church of Scotland, to the Secretary of State seeking an 'urgent meeting'. He wrote:

'we are deeply concerned about the proposed opening of public houses on Sundays in Scotland in view of the serious problem of alcoholism and alcohol abuse in Scotland today'.⁵⁶

A similar letter was also sent to MPs representative of each of the political parties - Richard Buchanan (Lab. Glasgow Springburn), Lord James Douglas-Hamilton (Cons. Edinburgh West), Hamish Watt (SNP, Banffshire) and Russell Johnston (Lib. Inverness). Arrangements were then made for a joint delegation from the Church of Scotland and the Free Church to meet the MPs at the House of Commons on June 30th. In his reply to L. Beattie Garden, Richard Buchanan offered the following piece of advice - 'tactically I would advise putting local pressure on the MPs who are in favour of Sunday opening of licensed premises'.⁵⁷

By the 25th June the Church of Scotland Alcohol Working Party had prepared a series of papers for the meetings scheduled for the 30th. As well as the above mentioned MPs, Harry Ewing, Donald Stewart (SNP, Western Isles) and Teddy Taylor were also seen. In a letter to

Teddy Taylor after the scheduled meeting, dated 2nd July, thanks were expressed to him for his advice and his 'suggestion as to how we might approach the various groups of MPs'. The Church stated - 'on our part, we can assure you that we are seeking to encourage those in the Church who feel as we do to write to their respective MP about the matter of Sunday opening'.⁵⁸ This the Church duly did in a circular to all ministers in early July. It set out the principal reasons for the Church's opposition to Sunday opening and reported on the meetings that had taken place between the Church's delegation, Government Ministers and other MPs at the House of Commons on the 30th. The circular stated:

'In our representations, we strongly emphasised the authority which the Church has to speak on this subject, based partly on the size of the Church's membership and also on the experience gained by the Church as the main voluntary group in Scotland caring for alcoholics and for those with serious drink problems. We were courteously and sympathetically received by the Secretary of State for Scotland and had opportunity for frank discussion with Scottish Members of Parliament. Although the Secretary of State has not reached a final decision on what the Government will now put forward at the Report Stage of the Bill on the question of Sunday opening we were left in no doubt that the Government's original decision not to allow public houses in Scotland to open on Sundays was their preference. We believe that the recommendation of the Standing Committee to allow Sunday opening could yet be reversed, but this will only happen if Scottish Members of Parliament are made aware of the strength of public feeling on this question. This point was stressed to us by many Members of Parliament whom we met, including the Secretary of State. Urgency in this matter is of paramount importance.'⁵⁹

Accordingly, the Church requested their ministers to write to their MP if they felt strongly about the issue and encourage members of their congregation to do likewise, emphasising that this should be done quickly as the Bill would shortly be before Parliament on the Report Stage.

The Church's late activity was reported by the Press with some astonishment. 'Kirk steps up fight against Sunday pubs' stated the 'Glasgow Herald'. But it pointed out that 'the strongest argument against any move to delete the Sunday opening provision from the Bill at Report Stage is that it would have to be done by the votes of English MPs, who already have Sunday opening'.⁶⁰ And the 'Daily Record' made a similar point under the headline, 'The Kirk fights on ... but why?' It commented, 'A democratic decision has now been taken by a Parliamentary committee. From all the evidence, it accurately reflects the view of the majority of the citizens of Scotland. All it seeks to do is to bring us into line with what the rest of the UK has enjoyed for years. Even the Kirk's usual wail that it will interfere with their traditional Sabbath is just so much eyewash'.⁶¹

Why then, did the Church of Scotland leave it so late to enter the fray? One reason already enunciated was that it accepted Willie Ross's statement on no Sunday opening at face value and was caught completely unaware when the Sunday opening amendment was carried. It did not bother to undertake any lobbying activity before the Committee vote, either to apply pressure, or even to ascertain how Members might vote. The only contact seems to have been an informal meeting with James White MP in late May during which the Rev. Keith Steven had discussions with him about the Church's views on both alcohol and abortion. Other than that the Church would appear to have taken it for granted that the Bill would complete its legislative passage without any alteration to the original Sunday opening laws.

Another reason relates to organisational and personnel changes within the Church itself. During this year 1975-76 both the Convener of the Moral Welfare Committee and the General Secretary and Director of Social Work stepped down and were replaced. The Convener of the

Moral Welfare Committee until 1975 had been Rev. L. D. Levison who had been responsible for drafting the Church's submission to Clayson and also for introducing the report to the General Assembly for approval. However, when his term of office had expired he had been replaced by Rev. P. Bisset. At the same time the General Secretary and Director of Social Work, Rev. L. Beattie Garden was succeeded by the former Associate General Secretary, Rev. Frank S. Gibson. In addition the Moral Welfare Committee was restructured to become the Committee of Social Responsibility. Therefore at a time when a piece of important Scottish social legislation relevant to the work of the Church was passing through Parliament, the Church's personnel and organisational structure was in a state of transition. To complicate the matter even further Frank Gibson, who was described by one source in the Church as 'the real driving political force', was on sabbatical leave for a period of time during which the Bill was before Parliament and as a result was not always on hand to deal with developments.

There would appear, then, to be two reasons for the Church's late intervention. Firstly there was acceptance of the omission of Sunday opening from the original draft Bill. The Church seemed reassured in the knowledge that Willie Ross was sympathetic to their viewpoint. Secondly, there was the upheaval in the Church's organisation and personnel which appears to have had an effect on its day-to-day functioning.

The result of these oversights have been chronicled by Robin Cook:

'... the churches failed to launch a parliamentary campaign until the decision had actually been taken, by which time they were reduced to the paradoxical position of inviting the whole House, including its preponderant English membership, to overturn the decision of a Scottish Committee. Predictably intervention at this late stage proved ineffective since most MPs had already been forced by press enquiries to take a public stance from which they could not easily retreat and rather resented being pressured to do so'.⁶²

Perhaps the strangest representation made on the issue of Sunday opening came from the Strathclyde Licensed Trade Association. Harry Ewing, speaking in Committee, let it be known that several representations had been made to him since the Committee's decision in favour of Sunday opening. Amongst them he had 'received a letter from the Strathclyde Licensed Trade Association expressing bitter opposition to the decision taken'.⁶³ However, a startled Alick Buchanan-Smith rose to his feet to state that he also had 'received a letter from that Association dated 21st June 1976 in which nothing is said about being bitterly opposed to the decision'.⁶⁴ He proceeded to inform the Committee that the Strathclyde Licensed Trade Association had asked that all existing public house licences should automatically become seven day licences without any special conditions attached. An irate Harry Ewing retorted that he took 'the strongest possible exception to any association ... sending letters on the same subject worded very differently to different parties in the House of Commons'.⁶⁵ Even Teddy Taylor was bemused, uttering 'in 12 years in Standing Committees I have never known a pressure group interested in a Bill give conflicting advice to the Government and the Opposition'.⁶⁶

What the Strathclyde Licensed Trade Association hoped to achieve by this action is not at all clear. Whether it was some sort of sophisticated ploy that backfired, administrative incompetence or simply crass stupidity, is impossible to tell. Whatever their idea all they succeeded in doing was to anger and alienate the very politicians they were trying to influence and lose credibility in their eyes as a serious and trustworthy organisation.

Following on the question of Sunday opening was the question of all day opening. Once more opposition amendments sought to do away with the afternoon break from 2.30 p.m. to 5 p.m. and so have permitted

hours from 11 a.m. to 11 p.m. as recommended by Clayson. The argument for all day licensing was put principally by Alick Buchanan-Smith and centred around the need for greater flexibility to cater for different community needs such as shift-workers, travellers, tourists, mid-afternoon shoppers and the like. The point was that the break was out of date and no longer suited modern working and leisure patterns in Scotland. He argued 'by having a more flexible and open system, one hopes to adopt a more civilised and modern attitude towards drinking'.⁶⁷

The case against was put by Teddy Taylor who took the view that abolition of the afternoon break would lead to greater absenteeism, involve longer hours for bar staff and lead to a deterioration in conditions of hygiene in pubs. On this occasion the amendment was defeated convincingly by 13 votes to 5 (Table 6.2).

TABLE 6.2 House of Commons Parliamentary Debate,
First Scottish Standing Committee, 18th May-1st July
1976, col. 516.

Ayes	Noes
Buchanan-Smith, Alick (Cons.)	Buchanan, Richard (Lab.)
Fairbairn, Nicholas (Cons.)	Campbell, Ian (Lab.)
McMillan, Tom (Lab.)	Cook, Robin (Lab.)
Monro, Hector (Cons.)	Craigen, J. M. (Lab.)
Rifkind, Malcolm (Cons.)	Douglas-Hamilton, Lord James (Cons.)
	Ewing, Harry, (Lab.)
	Gilmour, Sir John (Cons.)
	Hamilton, James (Lab.)
	Hutchison, Michael Clark (Cons.)
	Taylor, Teddy (Cons.)
	Watt, Hamish (SNP)
	White, James (Lab.)
	Wilson, Alexander (Lab.)

In this Division it can be seen that a number of Members who supported the Sunday opening of pubs crossed over to oppose all day opening. Lord James Douglas-Hamilton, Sir John Gilmour, Michael Clark

Hutchison, J. M. Craigen, James White and Hamish Watt all voted for Sunday opening but against all day opening. Again the majority of those voting in favour were Conservative while the majority voting against were Labour.

A major factor in the rejection of all day opening had been the 'trade' itself. The SLTA had requested that mandatory afternoon closing be retained for two reasons. Firstly, at this time a majority of its members still felt the afternoon break to be beneficial for staff. Secondly, there was a concern that in the event of all day opening, pubs which would prefer to close for the afternoon would be forced to stay open in order to remain competitive. So for reasons of uniformity the SLTA advocated that afternoon closing be mandatory.

The law as it affected young people was another area of pressure group interest. Apparently there was nothing in the law as it stood, nor in the legislation before Parliament, which prevented a young person under 18 being in possession of, or consuming, drink in a public place. As a consequence Teddy Taylor moved an amendment which would make it an offence for a person under 18 to be in possession of, or consume, alcoholic liquor in a public place. Here he had in mind the habit, especially in the urban areas, of groups of youths gathering on a street corner or in a public park to consume drink which they had managed to procure from an off-licence. In support of his case he quoted a recommendation from an information pamphlet of the Police Federation advocating that a police officer should have the power to apprehend an under 18 year old in possession of drink. This power would be similar to the power to apprehend an under 16 year old in possession of tobacco.

Harry Ewing, however, indicated that the Government had been in consultation with ACPO(S) about the implications of creating a new

offence and their feeling was that such a clause would not be enforceable and would be better left out of the legislation. Teddy Taylor, though, felt that the Scottish Office were not taking sufficient regard of the Scottish Police Federation (SPF) view. He commented:

'I think there is undue emphasis within the Scottish Office at present ... of consulting the Chief Police Officers without consulting the Police Federation. I know there is a lot of consultation with the Federation, but I often feel that there is a distinction drawn between matters on which it is considered appropriate to consult the Federation'.⁶⁸

In certain respects there does seem to be an element of truth in Teddy Taylor's remarks. Perhaps it is only to be expected though, that the Scottish Office will go to the apex of an organisation for an opinion rather than its middle or lower ranks. In Chapter 1 we noted the comment made by Chris Allen concerning the 'exclusiveness' of the Scottish Office administration. Here then, we can perhaps see an example of this 'restriction of influence over decision-making'.

It is interesting to examine the different perspectives from which the problem was viewed. ACPO(S) looked at the problem in the abstract. There was no doubting the matter constituted a serious social problem, but they thought it would serve no useful purpose to make the problem a criminal offence, a criminal offence moreover, which in practice was virtually impossible to enforce. The Scottish Police Federation (SPF) on the other hand, saw the problem in much more practical terms. It was SPF members, that is ordinary PCs on the beat, who had to deal with the situation on a day to day basis, and feeling powerless to do anything, urged that a new offence be created. On this occasion at least the police view was divergent. That the ACPO(S) view prevailed was probably as much to do with the weight of their argument as anything else, but being the senior organisation and being directly consulted by the Scottish Office was certainly no disadvantage.

A further issue of controversy which was to affect the police directly was the question of police entry to clubs. The Government had adopted in the legislation the Clayson recommendation that the police should have the same right of entry to clubs that they had to other licensed premises. Clayson's reasoning, it will be recalled, was that while this would, to a certain extent, infringe upon the members' privacy, it could, through better control of the conduct of premises, contribute towards improving social attitudes to drinking. However, a number of amendments appeared in Committee which attempted to restrict the entry of the police and make it conditional upon them being in possession of a signed warrant. Michael Clark Hutchison brought out the old chestnut that 'a club is a very different institution from a pub'.⁶⁹ What was at stake was a fundamental principle of individual liberty. Here we see a practical manifestation of the philosophical controversy discussed in Chapter 3. To what extent could conduct within the club be considered self-regarding in the sense of being limited to bona fide members? In what ways, if any, did the activities of members impinge upon the freedoms and rights of others outwith the club?

The Government, while accepting to a limited extent, the 'club as an extension of the member's home' argument, placed greater emphasis on the need for proper supervision and control given the growth in the number of clubs whose main purpose was the supply of drink. The central point was the need for common standards in supervision which applied to all licensed premises. The Government, for the time being, managed to defeat the amendment quite convincingly by 11 votes to 4, but it was clear that there was still uneasiness amongst certain members about the provision, an uneasiness which was to become evident again on Report.

An occurrence which was to provide an interesting insight into the ethics of lobbying involved the closing time of off-sales. The Bill as drafted required that off-sales close at 8 p.m., the idea being to make their hours of trading more akin to normal shopping hours. An amendment was moved by Malcolm Rifkind in Committee to restore the closing hour to 10 p.m. and this was accepted without much ado by the Government on two grounds. Firstly, 10 p.m. still maintained a distinction between off-sales premises and on-sales premises and secondly, certain sections of the trade had requested a return to the later hour. On this latter point Harry Ewing related a revealing anecdote. Mr. Ewing apparently had a meeting with Mr. Agnew of 'Agnew Stores', a chain of off-licences, on this question of closing time. At the meeting Mr. Agnew, who Mr. Ewing described as 'an obnoxious young man' argued forcefully that any reduction in hours of business would inevitably lead to redundancies, which would, he emphasised, not look at all good for a Labour Government. Moreover, as there were a number of 'Agnew Stores' in Mr. Ewing's constituency, there would be redundancies on his own doorstep. Further still, Mr. Agnew it seems, would make it his business to see, through the local press, that the local electorate knew exactly who was to blame. Harry Ewing, though, was experienced and astute enough to recognise a blackmail threat. However, unknown to Mr. Agnew, the Scottish Office had already decided to restore the old closing hour. Yet Harry Ewing was not to be denied his sport. Realising that the issue of redundancies was a red herring, he proceeded to inform Agnew that not only were the Government going to reinstate the old terminal hour, they were in fact considering extending it to give more opening hours. In which case, asked Harry Ewing of Agnew, 'how many extra people will you be able to employ?' 'Ah, but it doesn't work that way'

replied Agnew. 'Exactly!' retorted a smug Harry Ewing.⁷⁰

Whether one would consider the approach unethical is a matter of judgement. However, there is no denying that it was a crude and abrasive attempt to apply pressure, lacking in any subtlety or refinement, and as a consequence fell somewhat short of having its desired effect. All it succeeded in doing was to alienate the Minister in charge of policy. The incident seems to offer a good example of how not to approach a politician.

As the Committee proceedings drew to a close after a lengthy fourteen sittings, Teddy Taylor was still to be found fighting a valiant rearguard action for the cause of temperance. Gamely he tried to have veto polls retained but the amendment was defeated convincingly. His most novel contribution though, came on Clause 124 - Alcoholic Liquor in Confectionery. Mr. Taylor expressed considerable concern at the level of alcohol in liqueur chocolates. The alcoholic content of such chocolates, he informed the Committee, had just been increased by a Common Market directive and he was somewhat perturbed about the potentially deleterious effect this might have on the chocolate eating British public. After a lengthy diatribe against bureaucratic decision-making in the EEC, Mr. Taylor was forced to the despairing conclusion that this was just one more example of the loss of sovereignty of the British Parliament!

The party was still not over though. Even more entertainment was provided when an amendment came up in the name of Hamish Watt. Unfortunately for the hon. Member for Banff, he was not present to move it! This provoked Harry Ewing to launch into a scathing invective:

'There is a serious point about the absence of the hon. Member for Banff and the way he has treated the Committee. In the last three years we have been plagued in the House with constant allegations from the SNP and their supporters that Westminster never

gives enough time for this or for that aspect of Scottish legislation. Indeed, they run campaigns on this. Yet now that Westminster is giving a great deal of time, they insult the people of Scotland by deciding to absent themselves from the Committee. They rub salt into the wound by having the temerity or impertinence to put down amendments, and then their Member is not present to move them'.⁷¹

Mr. Watt's absence should perhaps be put into a wider perspective. Of the 14 occasions on which the Committee met, Watt is on record as having attended all but two, the 7th and the 14th. He is also shown to have voted in 16 out of the 31 Committee Divisions. Watt, it would seem, was rather unlucky to be on the receiving end of such a vilification!

The Bill came to the floor of the House for its Report Stage on 27th July and, as was expected, the main point of contention concerned the Government's attempt to reverse the Committee decision on Sunday opening. The Government sought to introduce a new clause which would have put the Bill back into the state in which it was before the successful amendment moved in Committee. Taking no chances the Government also had at the ready a second group of amendments which represented their 'fall back position' should the new clause be defeated. These had the effect of placing certain restrictions on Sunday opening.

A great deal of familiar ground was covered during the course of the debate. Bruce Millan again reiterated the need to strike a balance between the convenience of the majority and the possible dangers of increasing the problems of the minority. Sunday opening, he felt, would 'push us over that edge, cause damage and increase all the problems'.⁷² Malcolm Rifkind on the other hand, argued that it was illogical to advocate extended permitted hours on weekdays but not on Sundays. Further, it was even more unconvincing when alcohol could be readily obtained in clubs and hotels in any case. In keeping with

his predilection for stirring up controversy, Teddy Taylor was once again not to disappoint. Concerning the need to raise the standards of licensed premises, he stated contentiously:

'The situation may be anomalous now but it is improving. We are getting more hotels and clubs. With time and pure capitalism demand and supply will come together and drinking conditions will improve in Scotland'.⁷³

Needless to say, an irate Robert Hughes (Lab. Aberdeen North) was not so convinced about the merits of unfettered capitalism, accusing the hon. Member for Glasgow Cathcart of having 'a nerve to say that benevolent capitalists will in time improve the drinking situation in Scotland'.⁷⁴ As far as the substantive issues of Sunday opening were concerned, the debate tended to reproduce points and arguments which had been aired on previous occasions. What proved to be the interesting feature of this debate was the controversy over voting procedure.

The scene was set with Bruce Millan's early statement to the House:

'I would say a word about English Members in relation to the Division when it is called. I very much hope that this will basically be a decision of Scottish Members. It is not, of course, possible for me - it would be completely improper - to suggest that English Members are not entitled to vote on this issue. They are entitled to vote just as on other issues, Scottish Members within the last few days have voted on what have been exclusively English matters. I see nothing wrong in principle about that and, therefore, there has been no intention on my part to say that English Members should not vote. Nevertheless, I hope at the end of the day the vote will represent Scottish opinion on the matter'.⁷⁵

It does not take much reading between the lines to see that Bruce Millan was warning off potentially disruptive English votes, albeit in a most proper and constitutional manner. So, do English Members present a problem when there is voting on a purely Scottish issue? 'Not really' thought Malcolm Rifkind. 'Of course, English Members are perfectly entitled to vote. However, they do tend to take into account

the predominant feeling among Scottish Members so that on most occasions a Scots majority prevails. It is extremely rare for English Members ever to force a measure through against the prevailing tide of Scottish Members' opinion'.⁷⁶ Nor did Bruce Millan himself, despite his statement, think it was much of a problem since normally voting was along party lines. However, he said 'on free votes it would be very unfortunate if English Members did vote the other way from the Scots majority. On these types of issues people vote according to their own conviction - and of course, you can't stop them from voting'.⁷⁷ David Steel, though, was somewhat puzzled by Bruce Millan's statement to the House and suggested a possible solution. He commented:

'It was the first time I ever heard a Minister say in a debate on a Scottish Bill that he hoped that the English and Welsh Members had left so that we Scots could decide the matter by themselves. That is a very strange concept because the logic of it is - and I would support it - that we should long ago have devised some method of taking Report stages through the Scottish Grand Committee with only a final reserve power left to the House'.⁷⁸

On this occasion a Scots majority did prevail within the overall majority but unfortunately for Bruce Millan the majority voted against the Government's new clause prohibiting Sunday opening. This forced the Government into their fall back position of a series of restrictions on Sunday opening of premises, which they later had to introduce into the Bill. The 'Glasgow Herald' reported the event with the front page banner headline 'Yes to Sunday pubs - Majority of 21 in Commons vote'.⁷⁹

In this Division on the Government's New Clause 1 it should be remembered that an "Aye" vote in favour of the new clause was a vote *against* Sunday opening. A "No" vote represented a vote *in favour* of Sunday opening.

The turnout for this vote was particularly high with 66 Scottish Members going through the Division Lobbies. This represented 93% of Scots MPs. Of these 66 MPs, 36 voted in favour of Sunday opening and 30 voted against. Thus an overall Scottish majority of 50.7% prevailed in favour of pubs opening on the Sabbath in contrast to the 42.2% who believed they should remain closed.

Party composition in this 1974-79 Parliament gave Labour 41 Scottish seats, Conservative 16, Liberal 3 and the SNP 11. From Table 6.3 it can be seen that the Labour Party was remarkably divided on the issue, 19 Labour MPs (46.3%) voting "No" (i.e. in favour of opening) and 18 (43.9% voting "Aye" (i.e. against opening). This ambivalence reflected the two lines of thought which seemed to exist amongst Labour Members. On the one hand the likes of Dennis Canavan (West Stirlingshire), Neil Carmichael (Glasgow Kelvingrove) and John Mackintosh (Berwick and East Lothian) were typical of those who felt some of the hypocrisy that surrounded Sunday should be blown away. On the other hand the Government Front Bench of Willie Ross, Harry Ewing and Bruce Millan urged that MPs vote against Sunday opening, ostensibly on the grounds that such an extension would engender more drink related problems, but also because of religious concern with Sunday observance.

The Conservative Party were less reserved though. All their 16 MPs voted and of these 10 (62.5%) voted in favour of Sunday pubs while 6 (37.5%) opposed the idea. Similarly the SNP came out strongly in favour of opening on Sundays. 10 of their 11 MPs voted and 7 of this 10 registered a "No" vote (i.e. in favour of opening). Thus 63.6% of Scottish National Members voted for Sunday drinking in public houses, while 27.2% voted against by registering an "Aye" vote on New Clause 1. New Clause 1 was also supported by the Liberal Party whose 3 Scottish Members all voted for the clause and hence against Sunday opening of public houses.

House of Commons Parliamentary Debate, Vol. 916, col. 613 (Report Stage 27.7.76).

Division on Sunday opening of pubs.

The Division is on Government New Clause 1 which sought to put the Bill back into the state in which it was before the successful amendment moved in Committee to allow the Sunday opening of public houses.

Therefore an "Aye" vote in favour of the new clause is a vote *against* Sunday opening. A "No" vote against the clause represents a vote in *favour* of Sunday opening.

Figures in Tables include Tellers.

*Party composition at time of vote: Lab 41; Cons. 16; Lib 3; SNP 11.

TABLE 6.3 Scottish Voting by Party*

	Total vote	Scottish vote	Lab.	Cons.	Lib	SNP
Aye	36	30 (42.2%)	18 (43.9%)	6 (37.5%)	3 (100%)	3 (27.2%)
No	57	36 (50.7%)	19 (46.3%)	10 (62.5%)	0 (-)	7 (63.6%)

TABLE 6.4 Scottish Voting by Age Groups

	Total vote	Scottish vote	Under 35	35-44	45-54	55-64	65+
Aye	36	30	2	8	7	8	5
No	57	36	5	10	12	9	0

Table 6.4 shows Scottish voting by Age Groups. Only the over 65 age group was hostile to the Sunday opening provision, all the other age categories favouring the relaxation.

The analysis of Scottish voting by Religion (Table 6.5) has been by far the most difficult to undertake since there is no comprehensive list of religious beliefs held by MPs. While it is possible to obtain information on a Member's party, constituency, age, education and other particulars from 'Dod's Parliamentary Companion' and 'Who's Who', information on religious allegiances is not divulged. The only publication which reveals religious denomination is the 'Catholic Directory'. Unfortunately, no equivalent information is readily available on Protestants, Jews or atheists. Therefore the simple categorisation of 'Catholics' and 'Others' has had to be adopted. This is not as informative as one would have liked but it is all that circumstances permit. Table 6.5 thus shows the Catholic vote to have split narrowly against the Sunday opening of pubs, while the residual category is shown to have voted in favour.

The breakdown of voting by Schooling (Table 6.6) shows that MPs educated at a Scottish Secondary came out in favour of Sunday opening by a majority of 23 votes to 16. They were not, however, supported by their counterparts who had attended a Scottish Independent, this group of MPs coming out against pubs opening on a Sunday by 6 votes to 4. Interestingly though MPs with an English public school background did vote in favour of opening by 6 votes to 1.

Table 6.7 (Higher Education) shows that both Oxbridge graduates and Scottish university graduates voted in convincing numbers in favour of Sunday pubs, a combined figure of 23 votes to 15. Those with no further education voted marginally against the proposed liberalisation by 8 to 7.

TABLE 6.5

Scottish voting by Religion

	Total vote	Scottish vote	Catholic	Others
Aye	36	30	3	27
No	57	36	2	34

TABLE 6.6

Scottish Voting by Schooling

	Total vote	Scot. vote	Unknown	Scottish Element.	Scottish Secondary (Academy)	Scottish Indp.	English Grammar	English Public
Aye	36	30	3	2	16	6	2	1
No	57	36	2	0	23	4	1	6

TABLE 6.7

Scottish Voting by Higher Education

	Total vote	Scot. vote	Oxbridge	Other English	Scottish univ.	Other H.E.	None	Unknown
Aye	36	30	5	1	10	4	8	2
No	57	36	8	1	15	3	7	2

The most striking feature of Scottish voting by Region (Table 6.8) was the unequivocal vote against the Sunday opening of pubs by representatives of the Highlands. This can perhaps be attributed to the fact that the Highlands have the highest rates of alcohol related disabilities in the U.K. It is therefore not surprising that the region's MPs should have erred on the side of caution when confronted by a proposal which would make alcohol more readily available. The Highlands were in fact the only region to go against Sunday opening. While the Borders and Central divided evenly, the South-West, Glasgow, Edinburgh and the North-East all came out in favour of the extension of pub opening to Sundays.

Table 6.9 (voting by Occupation) shows that the only category to have supported the clause to keep pubs closed on a Sunday was 'Miscellaneous White Collar'. The Professions, Business, Forces and Workers all favoured pubs being allowed to open on the Sabbath day.

As was expected the issue of police entry to clubs once again appeared in the debate. Dennis Canavan tabled an amendment to restrict the right of police entry to clubs, a move designed to preserve the status quo. He informed the House in proposing the amendment that he had received a number of representations from clubs in his constituency contesting Clause 114, on the grounds that it was an invasion of the privacy of clubs. His contention was that there was a difference between a pub and a club, since a pub was a public place whereas a club, in theory at least, was often considered as an extension of the home. The Bill, as it stood, allowed for a right of entry for policemen at any time and for any reason. This, it was pointed out, could lead to the embarrassing situation where a constable could take the names and addresses of any person on the premises if he had grounds for believing an offence was being committed. The amendment, therefore,

TABLE 6.8

Scottish Voting by Region

	Total vote	Scot. vote	Borders	S.W.	Glasgow +'west'	Edin. +'east'	Central	N.E.	Highlands
Aye	36	30	1	3	11	3	5	1	6
No	57	36	1	5	13	6	5	6	0

TABLE 6.9

Scottish Voting by Occupation

	Total vote	Scot. vote	Professions ¹	Misc. ² White Collar	Business ³	Forces	Workers	Unknown
Aye	36	30	5	18	3	1	1	2
No	57	36	9	12	5	2	4	4

¹Includes medics, advocates, solicitors, university academics

²Includes teachers, civil servants, local government administrators, trade union officials, journalists

³Includes directors and self-employed farmers.

sought to restrict entry to those occasions when either the police had a warrant or had been given the permission of the club secretary.

Malcolm Rifkind also emphasised the differences between a pub and a club. He proposed his own amendment to allow uniformed police to enter a club without a warrant only if there was reason to believe that the time that would elapse before such a warrant could be obtained would prevent the enforcement of the law. Similarly, David Steel supported the principle of the amendments, pointing out that a club had control over its membership in a way that a pub did not have over its customers. It was wrong, he felt, to penalise long established bona fide clubs when the real problem lay in controlling the mushrooming of clubs which were not genuine.

With the weight of parliamentary opinion firmly against him, Harry Ewing was forced to concede the Government's position, commenting that 'it is a wise Minister who knows when he is on a loser'.⁸⁰ It was suggested that if all the amendments were withdrawn, the Government would undertake to reinstate the original clause requiring a police officer to obtain a warrant before entry.

Tam Dalyell (Lab. West Lothian), however, questioned the cause of the Government's change of mind of the issue:

'I was a bit disconcerted by what was apparently a fairly sudden decision by the Government to change their mind on the issue of police supervision of clubs. Why was that change made?'.⁸¹

Although Harry Ewing never spelt out the reasons to the House it would appear that it was a direct result of pressure from the club lobby. Dennis Canavan later revealed that both he and Harry Ewing had attended a meeting at one of the Miners' Welfare Clubs in his constituency to discuss some of the issues in the legislation affecting clubs. The club had made out a strong case to which Canavan was sympathetic, that

a club was essentially private, whereas a pub was public. However, it was not only the Scottish clubs that were concerned about police entry provisions, but also the English clubs as well. He indicated that around this time the clubs in the North of England were lobbying their MPs extremely hard on the issue of police entry without warrant. Mr. Canavan claimed that it was the three-way pressure from himself, Northern English MPs and the clubs which was responsible for the Government's reversal on the clause.

Harry Ewing confirmed later that this had been the case. The reversal of the Government's position had not unduly perturbed him though, since he was not sure that licensing legislation was the most appropriate place for such a clause to be, feeling that it might be better placed elsewhere. As far as his comment that 'it is a wise Minister who knows when he is on a loser' was concerned, he simply felt it would have been futile to have laboured the point any further, as to have done so, in the face of inevitable defeat, would only have led to a loss of Ministerial credibility.

What was the police reaction to this? What did they think of the argument, as presented in Parliament, that police entry as of right would have been an intrusion of privacy? The ACPO(S) spokesman, Supt. Bowman was nothing if not forthright. 'A lot of balls!', he responded unequivocally. He said that when a considerable proportion of licensed premises in Scotland were registered clubs it was illogical that the police should be denied entry as of right in order to carry out their function of supervision. 'The police are required by law to supervise so why should we not get into clubs?' he opined.⁸² His contention was that the measure concerning police entry was taken out due largely to MPs whose 'idea and vision of a club was one of plush leather armchairs, velveteen wallpaper and a haze of cigar

smoke. They simply failed to grasp the reality of the nature of some clubs in Scotland'.⁸³ Despite the clause being defeated, Supt. Bowman remained philosophical. The police were allowed their full say on the matter, but their recommendation had been rejected. There was no resentment about this because it was fully understood that was how the parliamentary process operated. 'In any case', he mused, 'the police survive without the clause'.⁸⁴

In answer to Tam Dalyell's question then, the Government changed their mind on the issue principally because of the weight of the club lobby and their effectiveness in mobilising widespread support for their cause among MPs. The clubs, through their representations, were successful in getting across their point concerning the fundamental difference between a club and a pub. Further, with the strength of the North-East England MPs thrown in with the prevailing Scots majority, the Government's chances of carrying the clause on a free vote were non-existent. In addition, while the police would have welcomed right of entry, it was not a provision of sufficient importance for them to make any strong stand. They simply acknowledged that they had been listened to, accepted the deliberations of Parliament and resolved to operate within the confines of the old law, a law with which they were already familiar.

The Bill proceeded to an immediate and formal Third Reading which gave the opportunity for a number of brief summary statements before the Bill was passed to the Lords. Harry Ewing in his winding up speech remarked - 'I used to describe myself as the "Three D's Minister" - divorce, devolution and drink. The divorce Bill is on the statute book, the drink Bill is on its way to another place and I should be grateful if hon. Members could give me the hat-trick'.⁸⁵ As fate would have it though, he was never to score his third goal.

The Bill was brought from the Commons to the Lords and given a First Reading on the 28th July. However, it was not until two months later, on the 29th September, that the Bill was read a Second Time and committed to a Public Bill Committee. The Lords concerned themselves with technical drafting amendments and only two issues stand out as being worthy of note.

The first concerned the schedule added by the Commons which placed restrictions upon the granting of Sunday licences which Lord Guest described as 'unduly restrictive, unnecessary, and really an insult to Scotland'.⁸⁶ Lord Kirkhill (Minister of State, Scottish Office) pointed out, however, that 'there is a question of judgement and a matter of opinion as to how far a reforming Bill should be totally radical'.⁸⁷ The safeguards in Schedule 4 were designed to protect against undue disturbance or public nuisance in a locality, for instance the opening of a public house on the ground floor of a tenement property. Lord Guest, however, took the view that it was unfair that an applicant who was considered suitable to have his premises open on weekdays should have to surmount a further obstacle to open his premises on a Sunday. By a narrow margin of 8 votes to 6 Lord Guest's amendment was agreed to, which had the effect of removing Schedule 4 from the Bill. Although an attempt was made by Lord Kirkhill to reintroduce it on Report, their Lordships again over-ruled it.

The second concerned the right of police entry to clubs. In accordance with the undertaking given by the Government, a new clause similar in terms to those of Section 159 of the 1959 Act was introduced on Report. It was evident though that a number of their Lordships were not happy with this state of affairs. Emphasis was placed on the strength of feeling that there should be equality of treatment in the

question of inspections and the rights of police entry in any licensed premises. The Lords were on the verge of rejecting the clause when it was pointed out to them that if they did so the Commons would not have the opportunity to discuss the amendment since procedurally it could not be reintroduced. This would have created a number of difficulties since the Government had already given the undertaking to restore the provision to its original form of police entry by warrant. So through 'a generous gesture of the Lords',⁸⁸ as Baroness Eliot put it, the new clause was allowed to stand.

The Bill was given a formal Third Reading on 2nd November and was returned to the Commons where the Lord's amendments were considered the following day. As was to be expected the debate centred upon the Lord's removal of the safeguards of Schedule 4. Bruce Millan pointed out that there was a general acceptance, both by those who were in favour of Sunday opening and those who were against, that if Sunday opening was to be permitted it would be necessary to write certain safeguards into the Bill. These safeguards, he stressed, were related solely to inconvenience and were not related specifically to the standards of the licensed premises themselves. Malcolm Rifkind also accepted the principle that different circumstances can and should be applied to Sundays as compared with other times of the week. However, J. P. Mackintosh found the arguments presented 'singularly unconvincing and even muddled'. He remarked, 'I find it a particularly odious bit of old fashioned sanctimonious Presbyterianism for people to suggest that we want two standards - one for Sundays and one for the rest of the week'.⁸⁹ Robin Cook reminded him though, that the interests of a great many people who live in tenements incorporating a public house have to be protected. He was less than amused that the safeguards for such persons had been removed by the Lords:

'It is not open to us in this debate to question the constitutional arrangements ... but pertinent questions about a two-chamber system are raised by a situation in which this House, after prolonged debate, arrives at a balanced compromise only to see it destroyed by another place, which clearly was not listening to our debate'.⁹⁰

Further, he suggested that the Lords who participated in the Licensing debates 'lacked comprehension of the way in which working people live in an urban environment in Scotland'.

It is interesting however, to contrast the viewpoint of Robin Cook on the Lords with that of the man who was responsible for bringing the licensing issue to the fore, Dr. Clayson. The good Doctor was moved to comment:

'you will find that as far as regards grammar, syntax, logical form, impartial analysis, not to mention discoverable meaning, the speeches of their noble Lordships in the upper House (of whatever political party) are far in advance of the verbiage from the Commons. And what is more their noble Lordships have time to do their homework!'.⁹¹

Two very divergent views indeed. Whatever the merits of their noble Lordships the relevant section of the schedule was restored to the Bill and the Sunday safeguards retained. With that the passage of the Scottish licensing legislation through Parliament drew to a close. All that remained was the formality of the Royal Assent.

VI. The Licensing (Scotland) Act 1976: Implementation and Interpretation.

The Licensing Bill received the Royal Assent on 15th November 1976 and its main provisions came into effect through a Commencement Order on 13th December 1976, with the exception of Sunday opening which had to be delayed until July 1977 for administrative reasons. The reaction to the new law was as expected. On the one hand, the trade in general was pleased about the new freedoms and relaxations

they had gained. On the other, the churches predictably expressed reservations about the effect of Sunday opening on family life, and about the possibility of increased alcohol abuse as a result of longer opening hours. In a press release issued in September 1977, the Church of Scotland was concerned at the large number of applications from public house owners for Sunday licences and extended hours. The statement urged congregations to lodge objections with the Licensing Boards wherever there were suitable grounds to oppose the granting of extended drinking time. The Rev. Harry Gibson, convener of the Social Responsibility Committee's Working Party on Alcoholism commented:

'It is our belief that in many areas of Scotland, extension of the licensing hours will undoubtedly cause undue disruption or public nuisance'.⁹²

The Church was taking the only rearguard action left open to it, given that Sunday opening was a *'fait accompli'* - to actively encourage objections to Sunday licences and to provide would-be objectors with information on how to object.

Reservations of a very different kind came from another source - Dr. Clayson. Writing in an article he stated:

'The role of licensing has changed. Its role now is to mitigate the evils we all see by reducing the pressure to drink; by improving the quality of leisure; by discouraging drinking as an end in itself; and by encouraging moderate drinking as a part of some other social activity. The new Scottish legislation will, from an administrative point of view, discard much that was obsolete and promote much that is wise in the practice of licensing; but in view of its limitations, will not have the full social impact on drinking habits for which we had hoped'.⁹³

As opposed to the Church's reservations which were based on the belief that the Act was much too liberal; Dr. Clayson's were based on the belief that the Act was not liberal enough. However, at this stage in 1977 nobody quite realised the way in which the legislation was destined to develop. Through the novel interpretation of Section

64 concerning the regular extension of hours, a situation was to arise where all day opening of pubs became possible. By applying for a regular extension of afternoon hours from 2.30 p.m. to 5 p.m. it was possible for a licensee to keep his premises open from 11 a.m. to 11 p.m. Thus, the 'all day pub' arrived, as it were, by the back door and in an ironical way one of Dr. Clayson's most important recommendations was fulfilled.

Just how widely appreciated was the possible interpretation of that clause? It would seem from the evidence gathered that knowledge of the possible use to which the Section could be put was not that widespread. The Secretary of State at the time, Bruce Millan, indicated that it was never envisaged that such an interpretation would be placed upon the Clause. He remarked 'the original idea was for it to be confined to tourist areas and the like - it was not intended to be applied in as wide a manner as it has been'.⁹⁴ The Opposition spokesman of the period Alick Buchanan-Smith also suggested that 'nobody could be sure of the way in which licensing boards would interpret that clause'.⁹⁵ Likewise, Malcolm Rifkind said that it was certainly not intended to have regular extensions in the manner that now prevails. While there was no doubt that the clause was being misinterpreted, it was not causing undue Ministerial concern in the Scottish Office since it had not created any significant problems. This was also confirmed by the police who indicated that the provision had not caused them any problems, although the issue was being kept under review. Supt. Bowman commented that as the regular extensions were granted on a yearly basis, this temporary grant was in many ways advantageous as it assisted licensing boards and the police in the supervision and control of premises.

Although the implications of the Section were not widely understood, there were certain organisations and individuals who did see how the provision could be utilised. Harry Ewing, for instance, in his dealings with the SLTA over the question of afternoon opening, warned them at the time 'that smart lawyers would be able to see how Clause 64 could be interpreted'.⁹⁶ A spokesman for the Law Society also indicated that 'they were aware that certain "abuses" would be possible in relation to the clause'.⁹⁷ Most significantly though, the Brewers seem to have been aware of the possibilities. A Scottish and Newcastle Breweries director, Mr. Alistair Mowat, said that the company undertook 'a leading role post-76'. 'The liberalisation process', he remarked, 'gathered steam from late 1976 throughout 1977 to early 1978'.⁹⁸ Initially there was the extra hour extension in late 1976, then came Sunday opening in late 1977, followed in early 1978 by the first issue of regular afternoon extensions. S and N, he indicated, were at the forefront of these developments, being the first company to go for extended hours, 'S and N set the precedent, having pursued the law with vigour'.⁹⁹

How successful then, has the new legislation been? In terms of all day opening the picture is somewhat uneven in that the different interpretations of the law by the various local licensing boards has produced a 'patchwork quilt' effect throughout Scotland. Essentially it has been the main conurbations which have taken advantage of the all day opening provision, while licensing boards in the rural areas have been more conservative and cautious in their granting of extensions.¹⁰⁰ This lack of uniformity has prompted the SLTA, rather ironically, to make representations to have all day opening introduced across the board.

On the question of the evening extension of licensing hours involving the additional hour opening until 11 p.m., early evidence from the Scottish Office is both favourable and encouraging.¹⁰¹

The SHHD undertook a research survey with the co-operation of Scottish and Newcastle Breweries and Tenent Caledonian Breweries, to monitor the change in consumption patterns before and after the introduction of the new Act. The survey involved monitoring the till readings in a sample of licensed premises to measure differences in drinking patterns which could be attributable to the changes in the law. The licensed premises in the sample were asked to record their till readings at specified times for each day of the week over three week periods before (November 1976) and after (March 77) the change in the licensing laws. The conclusion reached ran as follows:

'From this survey of cash takings in licensed premises there appears to be evidence that the extension of permitted hours has produced a more relaxed pattern of drinking. In bars remaining open until 11.00 p.m. there has been a significant reduction in the habitual increase in consumption just before closing time. These results are repeated for each day of the week and for bars in different neighbourhood locations, that is town centre, country or housing estate. The findings of the survey must, however, be treated with some caution since it has not been possible to verify that the sample is representative of all bars in Scotland'.¹⁰²

Clearly with only limited evidence available it is inadvisable to make any profound pronouncements on the implications and effects of the 1976 Act. It is still very early days, since an issue such as this involving changing social attitudes and mores can take years, decades or even generations to take full effect. Yet as far as can be judged at present the Act can be deemed a reasonable success. Here David Peck has observed that 'predictions of large increases in alcohol consumption after the relaxation of Scottish drinking laws have so far proved unfounded'.¹⁰³ And Martin Plant has also noted cautiously that

the extra drinking time leads 'not to an increase in alcohol consumption, but to a slower, more relaxed, rate of drinking'.¹⁰⁴

As one member of the Clayson Committee responded with tongue ever so slightly in cheek, when asked his feelings on his role in helping to create a more relaxed environment, 'one would like to think one is fostering the progress of civilisation'.¹⁰⁵

VII. Conclusion

At the end of each case study certain conclusions will be drawn which pertain to the case. Here, and at the end of the divorce study (Chapter 8) and the homosexuality study (Chapter 9), a short section will pull together some of the main themes which have arisen. So that these conclusions may be compared in Chapter 10, they will, as far as circumstances permit, follow a common format. It has to be borne in mind though, that as each case brings to the fore different types of issues and considerations, the emphasis in each conclusion may vary. Nevertheless, in order to make these comparisons in the final chapter, each conclusion will address itself to the following standardised questions. These questions are by no means exhaustive, but are offered merely as a means to initiate discussion.

1. What was the context of the reform?
2. What were the pressures for and against change? What was the role of pressure groups, especially the Church, Law and Medicine?
3. What was the role of governments, both Labour and Conservative? How did they react to pressures? What were their responses over time?
4. How did party politics affect the issue?
5. What was the role of individual MPs? How did they assess the issue? How did they speak and vote? Who was influential and why?

6. Did parliamentary procedure help or hinder change in any way?
How was the Scottish Grand Committee used?
7. What was public opinion on the issue? How did it change over time? Along what lines did it divide? Which categories of opinion were predominant?
8. How did the values of those making the decisions affect the outcome? What part did the 'assumptive world' of the policy-maker play? What kinds of cultural factors influenced those values?
9. What comparisons can be made with England? What were the similarities or differences in policy content and similarities or differences in enactment?
10. What was the 'Scottish dimension'?

In the last chapter the social and historical context of drink control in Scotland was discussed at some length and it is against this background that the licensing reform ultimately has to be understood. It was argued that Scotland not only had a history of separate licensing legislation from England and Wales, but that as a nation it also had its own distinctive attitude towards the place of alcohol in society. This attitude was based on an ambivalence which on the one hand saw alcohol as a dangerous and addictive drug and on the other as a requisite for sociability and hospitality. It was at one and the same time both condemned and approved. Further, it was suggested that this ambivalent attitude was one of the manifestations of Scotland's 'cultural neurosis', a feature of its 'cultural sub-nationalism' which had developed historically. The legacy of this 'neurosis' was to leave contemporary Scotland with a very much higher proportion of people with alcohol related problems than England and Wales.

A factor which contributed to this high level of alcohol problems was restrictive licensing. The Guest Report suggested some piecemeal alterations to the law in the early 1960s, but by the end of the decade more widespread reforms were being demanded. The licensing trade and the tourist organisations advocated a relaxation in the laws to ease the pressures to drink. Their concern though stemmed as much from an interest in commercial gain as it did from any social conscience.

The Clayson Committee, set up in 1971 to review Scottish licensing law, received more than 150 written submissions. The major bodies - the churches, the law and medicine were split in their recommendations. The Church of Scotland firmly opposed any relaxation in licensing hours, especially on a Sunday, whereas the Roman Catholic Church in Scotland thought a more relaxed approach to consumption would be for the common good. The legal profession tended to avoid making any dramatic statements either way on the issue. The Law Society of Scotland confined its comments to technical issues such as vicarious responsibility, although the Faculty of Advocates, while still couching its arguments in legalistic terminology, did come out rather more strongly in favour of liberalisation. The medical profession remained equivocal. The Scottish Council of the British Medical Association, the Institute of Psychiatry, and the Royal Colleges of Physicians and Surgeons in Edinburgh and Glasgow could not substantiate an opinion on the effect of licensing laws on the misuse of alcohol because of a lack of reliable evidence. They did, however, warn that problem drinking and alcoholism increased as alcohol became more available and for this reason some form of external control over the availability of drink should remain.

The range of other organisations urging liberal reform was varied. The Association of Chief Police Officers (Scotland), the Association

of County Councils in Scotland, the four city Corporations and the Scottish Trades Union Council, as well as the more obvious bodies within the licensing trade itself, and in tourism and commerce, all generally favoured a more liberal approach to licensing hours.

Opposition to any relaxation came mainly from the various Scottish Free Churches, the temperance movements and other assorted Christian groupings.

At this point in the evolution of policy recommendations, consultation between organisations and the Clayson Committee (based in the Scottish Office) were along formalised lines and communications were for the most part good. This was especially true for those groups with a high 'status' in the community who were granted virtually automatic participation both when the Committee was sitting and in its immediate aftermath.

While no formal group alliances were formed there seems little doubt that the broad support of diverse groups for certain proposals, for example the extension of evening closing time to a later hour, greatly influenced (and strengthened) the Committee's ultimate recommendations.

With the exception of the Educational Institute of Scotland which had a squabble over the wider implications of its submission, individual organisations submitting views to the Committee appear to have been able to resolve their internal disputes to the satisfaction of any dissenters so as to allow clear and precise recommendations to stand as the view of that particular organisation. However, there is some evidence to suggest disputes between different organisations with a common background or similar cause. Take for example the dispute within the licensing trade over extra hours; the Brewers' Association of Scotland were wholeheartedly in favour, but the

National Association of Licensed House Managers and the Scottish Licensed Trade Association, whose members would have to implement those house, were rather more reticent and looked for assurances in working conditions and pay. This was more or less a 'management-union confrontation' within the trade itself. Consider also the dispute between ACPO(S) and the Police Federation over the wisdom of introducing an offence to cover the possession and consumption of alcohol in a public place by a young person under age. Once again, this time from within the police, there were two different perspectives on the problem.

After the Clayson Report was published there was a short period of a few months to allow formal comment on the Report to be submitted to the Scottish Office. The views of the various organisations which made further representations remained by and large consistent with their previous positions. As one might expect those who opposed the Report's recommendations were rather more vociferous than those who found the Report acceptable.

In the period 1974-75 pressure group activity was minimal, being confined to those most closely involved in the subject like the SLTA, since licensing at this time was not yet an issue on the political agenda. It is interesting to note that Dr. Clayson felt obliged to involve himself in keeping the issue alive by courting the support of the media. He therefore remained active in his role as Chairman of the Committee.

Once the commitment to legislate was given by the Secretary of State for Scotland in October 1975, pressure group activity picked up. Perhaps the strangest example of lobbying came from the Strathclyde Licensed Trade Association, who for some bizarre reason saw fit to lobby both the Government and the Opposition with contrary proposals.

Also there was the example of 'crude' lobbying by the Agnew organisation which amounted to little more than an attempt at political blackmail. Further the Church of Scotland provided an example of the ineffectiveness of late lobbying when it only made its representations on Sunday opening of pubs *after* the decision had been taken. Obviously though, the effect different pressure groups had on individual decisions varied. However, once again a particularly important factor in determining a group's influence appeared to be its social standing and political weight within the community since such status facilitated participation in the consultation process.

The Conservative Ministers in the Scottish Office in 1970 appeared to react favourably to the pressures of the late 60s. According to Alick Buchanan-Smith, an Under Secretary at the time, there was considerable concern inside, as well as outside the Scottish Office about Scotland's drink problems. However, it should be noted that it was not only Scottish pressure which led to the appointment of Clayson. It had as much to do with the appointment of the Errol Committee in England and Wales as anything else. And Errol itself was a product of the findings of the Monopolies Commission Report in the late sixties on the sale and supply of beer.

It was, of course, a Labour Administration which inherited the Clayson Report in 1974. That they incorporated it into their legislative programme in 1975 is indicative of the cross-party nature of the subject. There is perhaps a little irony in this in so far as the Labour ministerial team at the Scottish Office seemed to be more conservative in their approach to liberalisation than their Conservative predecessors might have been.

While party politics *per se* did not enter into the formal debates because MPs were allowed to vote freely on the issue, there was,

nonetheless, evidence of voting along party lines on certain issues, especially in some of the Standing Committee divisions. For the most part though cross-party voting was evident and it could be seen in the division on the Sunday opening of pubs how the votes split: Labour were divided and favoured opening by only one vote, while the Conservatives were much more committed to the relaxation. With one or two notable exceptions the Conservative Members generally seemed to be much more receptive to a liberal licensing code than many of their Labour counterparts. Perhaps this may have had something to do with the fact that it was the Conservative Party which set up the original Clayson enquiry.

The licensing issue generated a number of novel cross-party alliances between individual MPs. Imagine for instance, Teddy Taylor (Conservative), Donald Stewart (SNP), David Steel (Liberal) and Willie Ross (Labour) all voting on the same side against the Sunday opening of pubs. Or George Younger and Alex Fletcher (both Conservative) dividing with Dennis Canavan and Neil Carmichael (both Labour) in favour of Sunday opening.

Parliament and individual MPs then, had a rather more important role to play in deciding upon policy options than the 'rubber stamp' role with which they are usually associated when party political matters involving the Whips are concerned. Several MPs made influential contributions which affected the outcome of particular decisions. For example, Malcolm Rifkind's eloquent argument in favour of the Sunday opening of pubs was of considerable importance in getting that amendment carried. Also, Dennis Canavan and Michael Clark Hutchison featured prominently in the campaign to reverse the decision to allow the police unrestricted entry to private clubs. And the influential contributions from J. P. Mackintosh, while not specific to any

particular decision, were of immense importance in setting the tone and widening the parameters of the debate.

That these men, or rather their arguments, prevailed over the rearguard actions of Willie Ross and Teddy Taylor can probably be attributed to the fact that they reflected the popular mood of Scotland. Scots were tired of being what they perceived to be 'second-class citizens'. They were, after all, asking for no more than England already possessed. Scotland was in a vibrant, energetic and expectant mood in the mid-1970s. The prospect of devolution and an Assembly lay ahead. That the Scots were no longer prepared to tolerate the Calvinist orthodoxy towards drink was just one more manifestation of a growing (albeit short-lived) self-assurance.

While the Licensing (Scotland) Bill was a government provision it was also allowed a free vote. In parliamentary terms this is a rather unusual combination. Since it was a government measure and since the government controls (for the most part) business in the House, licensing benefited from parliamentary time and a place on the legislative agenda. Therefore, unlike the majority of other issues involving free votes, it did not have to compete in the lottery for Private Members' time. The guarantee of time for adequate debate gave the measure a distinct advantage in completing its legislative passage (although a number of MPs were heard to carp about the ungodly hour at which some of those debates took place!).

Once on the political agenda, the Licensing Bill seems to have progressed smoothly along the well established path for Scottish legislation, although it was not without its points of controversy. Getting the issue on to the political agenda was a more contentious matter. Both sides of the argument have already been reviewed and the conclusion drawn that given the circumstances of the two 1974 Elections,

the issue came up for consideration in a reasonable space of time. Here the Scottish Grand Committee provided a useful forum for debating the general principles and implications of the Clayson Report. This debate in April 1975 helped to keep the issue to the fore and also acted as a sounding board for Scottish parliamentary opinion. That the Scottish Grand Committee was again used to take the Second Reading of the Licensing Bill the following year further facilitated its passage by removing it from the crowded timetable on the Floor of the House. It will be interesting to consider in the final chapter what possibilities might exist for the Scottish Grand Committee at the Report Stage of legislation progressing through Parliament.

Licensing was an issue which attracted much public interest. This interest was widespread and varied as was demonstrated by the range of submissions made to the Clayson Committee. The positions and arguments of the various organisations submitting evidence have already been well catalogued. Suffice to repeat here that the 'liberal' school of thought comprising the 'trade', tourist interests, the police and various local authorities prevailed over the Church of Scotland and the temperance lobby.

Public opinion, however, was not expressed only in formal submissions. Licensing was an issue which evoked popular appeal and therefore was the subject of media exposure. The Scottish press in the early and mid-seventies reported the divisions between the licensing reformers and the Kirk and generally came down in favour of a more relaxed approach to drinking. The 'Sunday Mail' and 'Daily Record' were especially important in campaigning for legislative action, and they were supported by 'The Scotsman' and the 'Glasgow Herald'. Opinion poll surveys on Scottish attitudes toward reform appear to be rather scant in number, but one which did feature in the 'Glasgow

Herald' of 6th and 7th October 1975 indicated that Scotland was in favour of Sunday opening of pubs and extended hours in the evening while being opposed to afternoon opening and the idea of 'family' pubs. The Clayson Committee of course, had already expressed reservations about the reliability of poll material in its 1973 Report.

The way in which individual MPs assimilated information about public opinion obviously varied according to their personal predilections and values. So their 'assumptive worlds' played an important part in the stances that were adopted and the decisions that were reached. Clearly, Willie Ross was of central importance in shaping the initial legislation and there seems little doubt that his Church of Scotland values were responsible for placing constraints upon many of Clayson's recommendations and especially for the omission of Sunday pub opening from the original Bill. But since licensing was an issue involving a free vote a number of Ross's restrictions came to be overruled by MPs whose values were more libertarian. These MPs, typified by J. P. Mackintosh, viewed the licensing issue in a different perspective from their traditionalist counterparts. Reasons why the liberal view prevailed have already been postulated. However, it is worth emphasising again that in these free votes the contribution of individual MPs can be of great importance in determining policy outcome. And to explain why particular policies emerge as they do requires at least some understanding of the values and perceptions policy-makers (in this case Scottish MPs) have of the problem and the wider environment.

According to Young (Chapter 2) values are sustained by cultural transmission. They can be influenced by class, ethnic, religious, regional or familial diversities. In the case of Scotland though, it is not only important to identify such diversities as may prevail

amongst Scots themselves, but also to identify whatever diversities as may exist between Scotland and its neighbours south of the border, England and Wales.

A comparison has revealed a number of things. Licensing law has had a different history either side of the border, differing in many of its procedures and legal technicalities as well as in some of its principles. But not only have the laws been different, more importantly, rates of alcohol misuse and alcohol related problems have varied dramatically with Scotland suffering a very much higher proportion of such problems than England and Wales.

Both Clayson and Errol reviewed the state of the licensing laws either side of the border in the early seventies. That a large measure of the Clayson Report was enacted while the Errol Report gathered dust was probably due to the fact that the problem in Scotland was seen to be much more urgent. Something had to be done to ease the pressure to drink which many thought the restrictive laws had helped to create. Further, there was a sense of grievance in Scotland that the Scots were being treated unfairly by being denied advantages and liberties which the English had enjoyed for many years. The disparities were perceived as being yet another manifestation of the Scots 'second class citizenship'.

The conclusion then, comes full circle. The 'Scottish dimension' in licensing policy, if it can be so described, lies in all of the aspects discussed above. It lies in the independent Clayson enquiry, in the interaction between Scottish pressure groups and the Scottish Office, in the role of individual Scottish MPs, in the parliamentary procedure for Scottish business, in Scottish public opinion, in the values of those with the power to influence policy, and above all, in the social and historical context of drink control in Scotland.

Scotland's ambivalent attitude towards alcohol was a feature of the historical development of 'cultural sub-nationalism'. And Scotland's reform of its licensing law in the 1970s was a concomitant of its increased self-awareness and its belief and expectation that its 'sub-nationalist' days were soon to be over.

1. Interview with Mr. Gavin Reed and Mr. Alistair Mowat, Directors of Scottish and Newcastle Breweries Ltd., 30th September, 1980.
2. Interview with Supt. Bowman, ACPO(S), 14th August, 1980.
3. Interview with Dr. Player, Scottish Health Education Unit, 8th October, 1980.
4. Interview with Mr. N. H. Rose and Mr. K. G. McGregor, the Law Society of Scotland, 14th November, 1980.
5. Report of the Moral Welfare Committee of the Church of Scotland, 1973.
6. United Free Church of Scotland Memorandum, August, 1973.
7. Association of Christian Teachers (Scottish Region) Memorandum, November, 1973.
8. Glasgow Herald, 12th October, 1973.
9. *ibid.*
10. T. J. Cartwright, Royal Commissions and Departmental Committees in Britain, London, Hodder and Stoughton, 1975, p. 205.
11. H. of C. Parl. Deb., Scottish Grand Committee, 15th April 1975, col. 44.
12. *ibid.*, col. 105.
13. *ibid.*, col. 17.
14. The Scotsman, 24th April, 1975.
15. Daily Record, 16th April, 1975.
16. Interview with Mr. Eric Ridehalgh, Secretary of the Scottish Licensed Trade Association, 25th August, 1980.
17. *ibid.*
18. Interview with Mr. Gavin Reed and Mr. Alistair Mowat, *op. cit.*
19. Interview with Mr. John Kerr, Member of the Clayson Committee, 27th October, 1980.
20. Glasgow Herald, 8th October, 1975.
21. Sunday Mail, 15th December, 1974.
22. Interview with Dr. Christopher Clayson, 4th March, 1981.
23. Sunday Mail, 15th December, 1974.
24. The Scotsman, 9th April, 1975.
25. Interview with John Kerr, *op. cit.*
26. Interview with Dr. Clayson, *op. cit.*
27. Interview with Bruce Millan, Secretary of State for Scotland 1976-79, 26th March, 1981.

28. Interview with Robin Cook, MP, 27th February, 1981.
29. *ibid.*
30. Interview with Harry Ewing, Minister of State at the Scottish Office 1974-79, 26th November, 1980.
31. *ibid.*
32. Interview with Mr. N. H. Rose and Mr. K. G. McGregor, *op. cit.*
33. Daily Record, 29th October, 1975.
34. Scottish Daily News, 29th October, 1975
35. Glasgow Herald, 6th October, 1975.
36. Letter from Rev. Keith M. Steven, Secretary of the Moral Welfare Committee to the Secretary of State for Scotland, 8th December, 1975.
37. Dundee District Council Minutes, 2nd December, 1975.
38. Interview with Supt. Bowman, *op. cit.*
39. *ibid.*
40. Interview with Robin Cook, *op. cit.*
41. Interview with Neil Carmichael MP, 25th March, 1981.
42. Interview with Dr. Clayson, *op. cit.*
43. *ibid.*
44. *ibid.*
45. Letter from R. M. Russell, SHHD, to Rev Keith M. Steven, Secretary Moral Welfare Committee, 22nd December, 1975.
46. Report of the Departmental Committee on Scottish Licensing Law, Cmnd 5354, HMSO 1973, p. 11.
47. H. of C. Parl. Deb., Scottish Grand Committee, 6th April 1976, col. 18.
48. *ibid.*, col. 22.
49. H. of C. Parl. Deb., First Scottish Standing Committee, 18th May -1st July, 1976.
50. *ibid.*, col. 105.
51. *ibid.*, col. 105.
52. *ibid.*, col. 106.
53. *ibid.*, col. 106.
54. *ibid.*, col. 448
55. *ibid.*, col. 450
56. Letter from L. Beattie Garden, General Secretary, Church of Scotland to the Secretary of State for Scotland, 21st June, 1976.

57. Letter from Richard Buchanan MP, to L. Beattie Garden, General Secretary, Church of Scotland, 23rd June 1976.
58. Letter from Rev. Frank S. Gibson, Associate General Secretary, Church of Scotland, to Mr. Edward Taylor MP, 2nd July, 1976.
59. Church of Scotland Circular to all ministers, 1st July, 1976, from Rev. Frank S. Gibson, Associate General Secretary.
60. Glasgow Herald, 1st July, 1976.
61. Sunday Mail, 4th July, 1976.
62. Robin Cook, 'Parliament and the Scots Conscience', in H. M. Drucker and M. G. Clarke (eds), *The Scottish Government Yearbook 1978*, Paul Harris Publishing, Edinburgh.
63. H. of C. Parl. Deb., First Scottish Standing Committee, col. 552.
64. *ibid.*, col. 553.
65. *ibid.*, col. 553.
66. *ibid.*, col. 554.
67. *ibid.*, col. 498.
68. *ibid.*, col. 627.
69. *ibid.*, col. 708.
70. Interview with Harry Ewing, *op. cit.*
71. H. of C. Parl. Deb., First Scottish Standing Committee, col. 829.
72. H. of C. Parl. Deb., vol. 916-1, col. 408.
73. *ibid.*, col. 427.
74. *ibid.*, col. 427.
75. *ibid.*, col. 403.
76. Interview with Malcolm Rifkind MP, 16th March, 1981.
77. Interview with Bruce Millan, *op. cit.*
78. H. of C. Parl. Deb., Vol. 916-1, col. 440.
79. Glasgow Herald, 28th July, 1976.
80. H. of C. Parl. Deb., Vol. 916-1, col. 561.
81. *ibid.*, col. 584.
82. Interview with Supt. Bowman, ACPO(S), *op. cit.*
83. *ibid.*
84. *ibid.*
85. H. of C. Parl. Deb., Vol. 916-1, col. 586.
86. H. of L. Parl. Deb., Vol. 374, col. 424.
87. *ibid.*, col. 432.
88. H. of L. Parl. Deb., Vol. 376, col. 712.
89. H. of C. Parl. Deb., Vol. 918, col. 1520.
90. *ibid.*, col. 1531.

91. Personal letter from Dr. Clayson, 8th October, 1979.
92. Church of Scotland Press Release, 30th September, 1977.
93. Dr. Christopher Clayson, 'The Role of Licensing Law in Limiting the Misuse of Alcohol', in G. Edwards and M. Grant, *Alcoholism: New Knowledge and New Responses*, London, Croom Helm, 1977.
94. Interview with Bruce Millan, *op. cit.*
95. Interview with Alick Buchanan-Smith, *op. cit.*
96. Interview with Harry Ewing, *op. cit.*
97. Interview with N. H. Rose and K. G. McGregor, *op. cit.*
98. Interview with Gavin Reed and Alistair Mowat, *op. cit.*
99. *ibid.*
100. Sunday Mail, 21st December, 1980.
101. D. M. Wann and D. Bruce, 'Evening Extension of Licensing Hours: Survey of Licensed Premises', Scottish Office 1979.
102. *ibid.*
103. D. Peck, 'Problem Drinking: Some Determining Factors', in M. Plant (ed), *Drinking and Problem Drinking*, London, Junction Books, 1982, p. 76.
104. M. Plant, *op. cit.*
105. Interview with Dr. John Sutherland, 20th August, 1980.

CHAPTER 7

Changing Attitudes to Divorce: The Fifties and Sixties

I. Introduction

The next two chapters will consider the issue of divorce reform, examining comparative developments on either side of the border over the last few decades. Divorce is an 'issue of conscience' and this will allow us to look at the changing moral climate since the mid-1950s. The purpose of this investigation is to ascertain how policy development on the divorce issue differed as regards Scotland and England.

In Chapter 1 it was noted that Scotland, after the Union of 1707, maintained its own legal system which necessitated certain legislation being framed in the idiom of Scots Law. It was also noted that since that date Scotland has maintained its own 'civil society' even although the Scottish State was assimilated into the United Kingdom. So while there had been an absorption in politics, there was still a separation in social mores (although, as will be seen, even this distinction was being eroded to some extent by the transmission of cultural values from the metropolitan south). Scotland, then, manifested a strange political ambivalence whereby it could be both dependent and independent within the wider British political system. It is this unique ambivalence that we shall explore through this particular case study.

Further, Chapter 2 outlined approaches to policy-making which, it was suggested, would be relevant and applicable to our case studies. For instance, it will be seen how, since it is dependent on a changing moral climate, policy development in 'issues of conscience' can often be incremental in style. Moreover, this chapter will try to highlight the theme that policy-making is both an intellectual activity and an

institutional process and that this is particularly true of 'issues of conscience'. In these moral areas not only must thinking (especially amongst a small number of influential policy-makers) be for the most part harmonious, but also institutionally there must be an opportunity which is conducive to initiating debate and enacting a legislative reform.

Control of the political agenda is thus an important factor in the success or failure of a particular measure. In this study on divorce it can be seen how the Government, because of its 'officiality', 'authority' and 'legitimacy', and in spite of its stated 'neutrality' when 'issues of conscience' are at stake, could, through its control over the parliamentary timetable, affect the outcome of English divorce reform. The study also allows us to examine what values were involved in policy formulation and how these evolved over time.

Section II of this chapter briefly sets out the philosophical perspective on divorce before Section III traces the history of divorce law reform from pre-Reformation times to the mid-20th century in both England and Scotland. Section IV takes up the discussion in the 1950s as divorce law reform began to emerge as a moral, social and political issue. Here it is suggested the demise of Eirene White's reform Bill in the 1950-51 Parliamentary Session displays some of the characteristics of a 'non-decision'. The Morton Commission on divorce reform which applied to both England and Scotland is outlined and its ineffectual recommendations criticised.

Section V then comprises the main comparative developments in divorce law reform on either side of the border. In Part (a) the Archbishop's Group and its publication 'Putting Asunder' is discussed along with the Law Commission's commentary on it, 'The Field of Choice'.

These papers were the basis upon which English law was subsequently reformed. The 'politics' of the English Divorce Reform is discussed under the sub-heading 'Parliamentary Activity' and this charts the progress of the unsuccessful Wilson Reform Bill in 1968 and the successful passage of the Jones Bill in the following Session 1968-69. The importance of gaining tacit Government assistance in the form of additional parliamentary time becomes apparent at this point. Also highlighted here is the importance of the unremitting efforts of Leo Abse in steering the Bill through Parliament.

In Part (b) Scottish developments are examined and similarities and contrasts drawn against the English experience. What emerges from this examination is that Scotland appears for the most part to have followed in the wake of the English debate, as far as the principles of divorce were concerned. The Report of the Scottish Law Commission, 'Divorce: The Grounds Considered', is outlined here. The Scottish Law Commission which 'shadowed' its English counterpart more or less adopted its main recommendations, revising them only to meet the technical requirements of Scots Law. The role of the Church of Scotland is then considered. Stimulated by the activity in England, the Church of Scotland, after a Working Group had studied the issue carefully, came out with what was to be the most radical proposal of all - separation for a continuous period of two years, consequent upon a decision of at least one of the partners not to live with the other, should act as the *sole* evidence of marriage breakdown. In the space of a decade the Church had shifted its thinking on divorce on to radically different ground.

At this juncture in the late sixties English proposals went on to become law while Scottish proposals never got off the ground. In drawing this section to a close the attitude of the Scottish Office

is examined and compared with the Home Office. Some of the prophetic statements that appeared in Parliament about the fate of Scottish divorce reform are then noted and, together with the concluding remarks, they serve as a prelude to the next chapter on the Scottish divorce issue in the 1970s.

II. Philosophical Perspective

Divorce is one of those issues which, as well as embodying social and political considerations, raises fundamental religious and moral questions. Lord Gorrell, chairman of the 1912 Royal Commission on Divorce, put it succinctly:

'the questions raised on the inquiry touch not merely upon human laws and institutions, but upon matters which are affected by religious beliefs and opinions, and are regarded by very many as concerned with man's spiritual welfare as well as with his social conditions'.¹

One problem lies in the varied ecclesiastical doctrines on the subject of marriage and its dissolution. Views differ not only between denominations but in some instances also within churches. Gorrell's contention was that such divergence was illogical:

'all (Christian) churches have identically the same sources from which to draw their conclusions; and although there is a whole world of literature upon the subject, the original materials on which the question depends are extremely limited. If these materials in the Old and New Testaments are examined without partiality or preconceived inclination to arrive at one result rather than another, and with adequate regard as to the origin of these materials, there ought to be no reason for such wide diversity of opinion'.²

The result of such diversity in religious opinion was to diminish its sphere of influence:

'questions relating to marriage and divorce affect all the inhabitants of this country, whether they are believing Christians, nominal Christians, or do not belong to any Christian church, and the Legislature cannot allow its consideration of these

questions, even in a country in which the larger proportion of the inhabitants are Christians, or nominally such, to be limited by the views expressed by representatives of Christian churches, especially where so much difference exists between them'.³

From these various religious interpretations of the Scriptures three basic, but different principles have emerged:

1. that marriage is indissoluble;
2. that marriage is dissoluble on the ground of adultery;
3. that marriage is dissoluble for such grave causes as render joint married life actually or practically impossible.

It is against the background of these moral principles concerning relations between the sexes, and the progressively changing conceptions of their utility, that secular divorce law has evolved historically.

III. Historical Development

While serious breach of the obligations involved in matrimony has always been regarded as constituting a legal as well as a moral wrong, the historical development of divorce law differs quite markedly between Scotland and England.

In Pre-Reformation England all matters relating to marriage and its dissolution lay within the exclusive jurisdiction of the Ecclesiastical Courts, with an appeal from their decisions to Rome. The Church at that time held that a valid marriage between Christians was indissoluble and so the only 'divorce' possible was divorce 'a mensa et thoro' (from board and bed) which in effect was only the equivalent of a judicial separation. However, there was a system of effecting complete separation by means of decrees of nullity, the grounds for which were numerous. These, in effect, declared a union not to have been a valid marriage because of some basic impediment which existed at the time the supposed marriage took place.

Immediately prior to the Reformation, the first Acts dealing with particular marriages were those related to Henry VIII and during his reign relations between Church and State were placed on a fresh basis, the Crown being treated as the supreme authority in both Church and State.

After the Reformation there seems to have been some irregularity in the operation of the divorce laws. The ecclesiastical law as to divorce remained unchanged by statute with only decrees 'a mensa et thoro' which recognised separation but did not permit remarriage. However, it appears in the years immediately after the Reformation people, not infrequently, regarded themselves as entitled to re-marry after, and sometimes even without, a divorce 'a mensa et thoro'. Subsequently though, it came to be recognised that without a private Act a valid marriage could not be dissolved. The pattern was set in 1697 when Parliament agreed to pass a Private Bill which gave the Earl of Macclesfield an absolute divorce from the Countess and from the end of the 17th Century Acts of Parliament dissolving marriage became increasingly frequent, although it must be added only among the monied classes. The process was both slow and expensive and over the period 1715 to 1852 the total number of dissolutions amounted to only 244.

The Matrimonial Causes Act of 1857, based on the Report of the Royal Commission of 1850-53, abolished the jurisdiction of the Ecclesiastical Courts and set up a new state Court for Divorce and Matrimonial Causes. The most important provision of the Act was the introduction of the petition for the dissolution of marriage. Absolute divorce - divorce 'a vinculo matrimonii' - was to be granted on the same basis as had applied in private divorce legislation, i.e. adultery by a wife and aggravated adultery by a husband. This legislation

had the effect of giving lesser rights to wives than to husbands.

A further review of the divorce law was carried out by the Royal Commission of 1909-12 which effectively set out and analysed the opposing points of view on the issue. The Report was not unanimous, but the majority recommended that sexual inequality should be eliminated as regards the grounds on which a divorce might be obtained and that the grounds for divorce should be expanded to include desertion for more than three years; cruelty; incurable insanity; habitual drunkenness found incurable after three years from first order of separation; and imprisonment under commuted death sentence.

The War intervened to prevent early action on the Report. However, in the post-war years with the enfranchisement of women, an Act in 1923 gave them equal rights in the sphere of matrimonial law allowing them to claim divorce on the same grounds as men, i.e. adultery.

A quarter of a century was to elapse before any of the main recommendations of the Gorrell Commission were given legislative effect. In 1937 a Private Member's Bill, sponsored by A. P. Herbert, introduced desertion for three years and upwards, cruelty and incurable insanity as additional grounds for divorce.

In sum then, up until 1857 divorce, in common law as well as ecclesiastical law, and in practice, remained essentially unrecognised except through private Acts of Parliament which were the preserve of the wealthy. In the years 1858 to 1937 adultery remained the principal ground of divorce in England and Wales.

The development of the divorce law in Scotland presents a marked contrast. Admittedly before the Reformation in Scotland, as in England, jurisdiction in matrimonial matters rested with the Ecclesiastical Courts. Decrees of divorce granted by those courts did not in any sense sever the marriage bond, being in effect decrees of

judicial separation. However, after the Reformation, both adultery and desertion became recognised as grounds for dissolution of marriage. With the introduction of divorce in 1560 no distinction was made between the sexes in respect of the grounds on which divorce could be obtained. From that time until 1938 the grounds for divorce remained unchanged. Scottish practice was therefore much more liberal than that which prevailed south of the Border.

The dissolution of marriage on the grounds of adultery was not formally introduced into Scotland by statute, but immediately after the Reformation the courts held it to be the law of the country. The courts appear to have adopted a similar attitude as regards desertion, only in this case wilful desertion as a ground for the dissolution of marriage was confirmed by statute in 1573, four years being fixed as the minimum period during which the desertion must subsist.

The Westminster Confession of Faith was adopted by the Church of Scotland in 1647 and ratified by Act of Parliament of Scotland in 1690. Chapter 24 was headed 'Of Marriage and Divorce' and Articles 5 and 6 ran:

'In the case of adultery after marriage, it is lawful for the innocent party to seek out a divorce and, after the divorce, to marry another, as if the offending party were dead.... (N)othing but adultery, or such wilful desertion as can noway be remedied by the Church or Civil Magistrate, is cause sufficient of dissolving the bond of marriage, wherein a publick and orderly course of proceeding is to be observed...'.⁴

After the Reformation divorce jurisdiction passed into the hands of the Commissary Court of Edinburgh with appeal to the Court of Session, and on abolition of this jurisdiction, by the Court of Session Act 1830, exclusive jurisdiction in divorce became vested in the Court of Session, where it has since remained.

For almost four centuries then, the law of Scotland was more liberal and in advance of the law as it stood in England. It was not until the Acts of 1937 and 1938 that the law on both sides of the border came more closely into line. The 1937 Matrimonial Causes Act, applicable in England and Wales, and the Divorce (Scotland) Act 1938, applicable north of the border, while maintaining the traditional differences in legal practice, set out roughly comparable grounds upon which divorce might be granted - adultery; desertion for at least 3 years; cruelty; incurable insanity; and sodomy or bestiality.

IV. The Emergence of the Divorce Issue in the 1950s

Richards has pinpointed the forerunner of the contemporary debate on divorce law reform as the Bill promoted by Mrs. Eirene White (Lab. East Flint) in the 1950-51 parliamentary session. The measure sought to allow divorce in cases where a couple had lived apart for seven years, even where one party to the marriage objected. This introduced a whole new set of principles into divorce. No longer would the concept of matrimonial offence be the sole ground for divorce. Instead, the concept of the breakdown of marriage was introduced. Where it was clear that a marriage was dead, society was asked to accept the fact without seeking to classify the spouses into guilty and innocent parties. Introducing her Bill, Mrs. White stated:

'The social purpose of this Bill is to meet the situation in which many thousands of men and women are living apart in a state which is not marriage, in any full sense of that word, but in which they are unable legally to form another union or to establish a normal home life'.⁵

The fate of this Bill though, was to illustrate the way in which an issue can be removed from the political agenda and in a number of ways it manifested the characteristics of non-decision-making discussed

in Chapter 3. As Richards has noted, 'the Labour Government at this stage had but a negligible majority in the Commons and decided to avoid the issue by the traditional delaying device of a Royal Commission'.⁶

The Attorney-General of the period, Sir Hartley Shawcross proposed:

'that the best way of dealing with the present proposals in the long run, the way which would arouse least bitterness of religious or partisan conflict, would be to recommend the appointment of a Royal Commission to study the whole field of our marriage laws, rather than to attempt, at this stage, perhaps insufficiently considered legislation dealing piecemeal with one aspect or another of what is, in fact, a very wide problem'.⁷

Although emphasising the Government's neutrality, he pointed out that to take a vote on the Bill 'would inevitably tend gravely to prejudice any subsequent inquiry'.⁸ Despite the Second Reading being carried by a clear majority of 131 to 60 votes, it was apparent from the Government's attitude that there was little hope of the Bill becoming law, so Mrs. White was to withdraw her Bill in return for the promise of the Royal Commission.

The ensuing Commission, whose remit included both England and Scotland, sat for four years and was headed by Lord Morton. The Report, published in 1956, was however, in the words of Professor Richards, 'an undistinguished document'. He commented:

'Not merely did the Commissioners fail to agree but they took no steps to initiate research into their problem. For them the collection of evidence meant the collection of opinions. Their method of proceeding was wholly that of the nineteenth century. Either the Commission knew nothing of social science or they believed it had nothing to offer them'.⁹

An even more scathing attack on the Report came from O. R. McGregor who described it in 1957 as a 'soufflé of whipped conjectures'.¹⁰

He criticised the composition of the Committee which lacked any recognised professional social scientist. This, he suggested, went far in explaining the character of the Report. The Commission's terms of reference required it to consider the desirability of changes in the law and its administration according to the criterion of the need to promote and maintain healthy and happy married life and to safeguard the interests and well being of children. McGregor argued:

'This criterion imposed the inescapable obligation to consider the causes and social consequences of divorce, and to assess the implications of changing attitudes to marriage. No Commissioner possessed expert knowledge of the considerable body of modern sociological research on such topics, or was equipped with an understanding of the techniques and potentialities of social investigation developed during the last twenty years. Lacking such essential assistance, the Morton Commission joined the Jumbies and went to sea in a sieve'.¹¹

Further, he continued:

'The prerequisite of fruitful social investigation is the ability and willingness to formulate relevant questions. Such capacity was not to be expected of a Commission dominated by lawyers who, whilst paying lip service to the need for judging proposals by the test of the social good, are conditioned to define both social problems and the social good in legal terms. The Commission's Report is substantial evidence of its members' ignorance of the social sciences'.¹²

Here we can perhaps draw some comparisons between the approach of the Morton Commission and the approach of the Clayson Committee on Scottish Licensing Law which was discussed earlier in Chapter 5. While the Morton Commission was criticised for not having the ability or willingness to formulate relevant questions, a distinguishing feature of the Clayson Committee was its enlightened, almost philosophical, approach to its subject. Although composed of non-specialists, the Clayson Committee membership nevertheless possessed a broad range of professional skills which could be applied to the licensing issue. In addition, the Committee utilised much relevant technical and statistical information in its efforts to work out the assumptions,

principles and objectives by which it would operate. Thus, there are marked contrasts in the style of each Committee. Whereas Clayson examined the issue of licensing in the context of other types of control available to prevent the misuse of alcohol, Morton made no comparable attempt to broaden the scope of the enquiry into the divorce issue, failing, in McGregor's words, 'to assess the implications of changing attitudes to marriage'.

The basis of the Morton Commission's analysis lay in its belief that a great number of marriages were breaking up which in the past would have held together. This was attributed to an increasing tendency to regard divorce, not as the last resort, but as the obvious way out when things started to go wrong.

This analysis met with harsh criticism from McGregor as accepting as self-evident truths the unverified conjectures of many 'institutionalist' witnesses. He remarked that 'there is no doubt that the Commission regards the break up of the middle class, mid-Victorian family code as leading to the disintegration of the family'.¹³

The central issue then, which confronted the Commission was the retention or abolition of the matrimonial offence as the basis of divorce law. With one exception, Lord Walker, the Commission agreed that the law based on the doctrine of matrimonial offence should be retained. However, rather surprisingly in view of this declaration, the Commission proceeded to divide into two main groups according to their attitudes to proposals for extending the grounds for divorce. The first group of nine resisted any extension of the law which would admit the principle of the breakdown of marriage. They thought the consequences of providing an 'easy way out' would be disastrous to the stability of marriage.

'If the principle that a marriage should be ended if it has irretrievably broken down is followed to its logical conclusion, then it must be accepted that a spouse who had committed no recognised matrimonial offence could be divorced against his will. In our opinion, this would be so plainly unjust as to be in itself conclusive against the introduction of any ground of divorce which had this result.... The introduction into marriage of this sense of insecurity and uncertainty would have a most disturbing effect on family life, which would ultimately react on all members of the community'.¹⁴

A second group of nine members, however, considered that the time had come to introduce the doctrine of breakdown of marriage to a limited extent. They recommended that where husband and wife had lived separate and apart for seven years, it should be possible for either spouse to obtain a dissolution of the marriage, if the other spouse did not object. They thought it important 'to recognise that matrimonial offences are in many cases merely symptomatic of the breakdown of marriage, and that there should be provision for divorce in cases where, quite apart from the commission of such offences, the marriage has broken down completely'.¹⁵

Four of these nine went further and recommended widening the scope of the new ground to allow a husband or wife to obtain a dissolution of the marriage, notwithstanding the other spouse's objection, provided the court was satisfied the separation was in part due to the unreasonable conduct of the objecting spouse. They saw 'no benefit to society to the individual or to the State in maintaining marriages in name which are no longer, and on all foreseeable estimates will never be, marriages in fact'.¹⁶ However, these Commissioners never explained how they reconciled their proposals to allow divorce after long separation with their desire to retain the doctrine of the matrimonial offence. In effect it was a curious blend of the breakdown of marriage principle with a modified version of matrimonial offence. By seeking to combine the two opposing principles McGregor

accused them of turning 'divorce law from anomaly into absurdity'.¹⁷

So in contradistinction to the Clayson Committee on Scottish Licensing Law where recommendations were grounded upon a recognised understanding of the direction in which it was desirable for Scottish Licensing Law to move, the Morton Commission lacked any such clear 'philosophy' as to the direction divorce law should take.

The Commission was thus irreconcilably divided on the main issues. As a consequence the Report had no influence and was in fact less progressive than the House of Commons had been some five years earlier in 1951. Lacking essential social science data on marriage and divorce the Commissioners' justifications of their views amounted to no more than an identification of the social good with their personal presuppositions. Nevertheless, at least one noble Lord seemed suitably impressed with the document. Speaking in the House of Lords on the debate on the Morton Report, Lord Silkin announced:

'I cannot remember reading a Report of a Royal Commission which is so clearly expressed and which puts the case in such an interesting way. If any of your Lordships is ever in need of a little light reading I would recommend this Report as worthy of consideration'.¹⁸

Could this possibly be the same Report as the one to which McGregor referred when he wrote:

'The Report ... contributes nothing to our knowledge and fails even to clarify and define opposing viewpoints or to facilitate public discussion. Instead of the traditional division into majority and minority Reports, the Commission presented its readers with a luxuriant confusion of footnotes indicating agreement or disagreement of different Commissioners with this or that proposition or paragraph. It is a matter of opinion whether the Morton Commission is intellectually the worst Royal Commission of the twentieth century, but there can be no dispute that its Report is the most unreadable and confused ... The Morton Commission has proved a device for obfuscating a socially urgent but politically inconvenient issue'.¹⁹

V. Comparative Developments in England and Scotland

(a) England

Having faded from the political agenda for the remainder of the fifties, the divorce issue did not reappear for eight years. Leo Abse (Lab. Pontypool) winning a place in the Private Member's Ballot, introduced a Bill in the early months of 1963 which contained two main provisions, one which sought to facilitate reconciliation between estranged couples, and another, the intention of which was to extend the grounds of divorce by permitting the dissolution of marriage after seven years' separation. Abse introduced his Bill on the Second Reading debate with his usual caustic style and wit. He remarked:

'I realise that the House may consider it a little impertinent to introduce a Bill in respect of Royal Commission recommendations upon which dust has settled for a mere eight years. In matters affecting human relationships this House always moves with considerable caution. But I would pray in aid that ... the only clause that the most conservatively minded Member of this House ... could regard as having some novelty is one that I am told was first recommended by a Commission presided over by the first Archbishop of Canterbury of the Protestant Church of 1552. I hope, therefore, that the House will consider that, whatever else may be said, it cannot be suggested that I and the other sponsors of the Bill are bringing forward a hasty and ill-considered measure'.²⁰

However, despite Abse's exhortations serious objections to any extension of the grounds for divorce were to arise both within and without Parliament. While the provisions facilitating reconciliation between estranged couples caused little controversy, the proposed new separation clause met with strong religious opposition with harsh criticism coming from the Church of England. Ronald Bell (Cons. Buckinghamshire South) was a typical opponent of the Bill. He was at pains to emphasise that he was not objecting to the clause 'on any narrow grounds of resisting progress or of prejudice' but because he genuinely

believed that 'such proposals would be wholly inimical to the institution of marriage and the happiness of the people of this country'.

'This is a Christian country', he informed the House, 'and those of us who hold the Christian religion are entitled to say that the general atmosphere of our laws should be based upon the basic tenets of that religion'.²¹

Such a line, of course, has serious implications for the foundations of public policy in a democracy and runs contrary to the position adopted by Lord Gorrell in 1912 when he argued that the Legislature could not allow its consideration of such questions to be limited by the views of the Christian churches.

Bell's comments adhere closely to the arguments of Lord Devlin outlined in Chapter 4 and provide a good example of a defence of the 'disintegration thesis'. The essence of this argument is that the State has a duty to uphold moral standards because these are essential to the maintenance of society. Society has a right to preserve its own existence and therefore the right to insist on some kind of moral conformity - in this case the moral orthodoxy of the Church of England.

'In April of 1963, with a Conservative government ... in power, the churches mobilized the whole Establishment to obliterate my Bill',²² Abse was later to write. The actions of the Church of England hierarchy, both covert and overt, placed him in a position where he was obliged to withdraw the separation clause in order to secure the passage of the uncontroversial reconciliation provisions, although not before he had launched several scathing broadsides against them for defending the bourgeois ethic. He commented:

'I knew that after the Churches had acted I could not under a Tory government, put my Bill through Parliament:

the Church of England was still the Conservative Party at prayer. It was to the country not to Parliament I was speaking; and although I knew it would take some years before the walls finally fell, this assault had to be fierce if the foundations were to be irrevocably weakened'.²³

There can be no doubt that the Abse measure, and indeed the man himself, was the catalyst that reactivated discussion of the divorce issue in the sixties and brought it back onto the political agenda. In the June of 1963, the Archbishop of Canterbury announced in the House of Lords with some ambivalence and reluctance, the formation of a working group to review the divorce law. This group was formally appointed as a Church of England Committee in January 1964 under the Chairmanship of Dr. Mortimer, Bishop of Exeter, to review the law of England concerning divorce. Its terms of reference explicitly recognised the differences in attitude between church and state and confined the scope of the enquiry to what the church ought to say and do with regard to the secular laws of marriage and divorce. The Report of the Archbishop's Committee, 'Putting Asunder', was published in July 1966.

The Report was an extremely important document in that it heralded the turning point in the Church's attitude to divorce. It effectively condemned the divorce doctrine of absolute matrimonial offence and suggested an entirely new framework. The principle of the breakdown of marriage was to replace the doctrine of matrimonial offence and there was to be no accusatory procedure and thus no guilty or innocent party. A divorce would be granted if a court was satisfied that a marriage was truly at an end, that no reconciliation was possible, that adequate financial provision had been made for the dependent spouse and the children, and that there was nothing in the conduct of the petitioner that would make it contrary to the public

interest to grant a divorce. However, the method by which these facts were to be established was to take the form of a prolonged inquisition into the circumstances of the candidates for divorce. Thus, a court hearing into a divorce application would come to resemble an inquest.

The Church's new found realism was set out in the early paragraphs of the Report:

'(I)t is right that Parliament should make provision for divorce and remarriage. Indeed it conforms with natural justice by so doing, since natural justice requires that human law should not be the tyrannical imposition upon the community of an alien code, but an expression of the community's own mind... Any advice that the Church tenders to the state must rest not upon doctrines that only Christians accept, but upon premises that enjoy wide acknowledgement in the nation as a whole. No one should think, therefore, that advice from the Church in this matter is bound to represent an ecclesiastical attempt to obtain legal enforcement of specifically Christian tenets'.²⁴

The Archbishop's Group discovered in the course of their inquiries that in practice the courts had already gone a considerable way towards transforming judgements theoretically founded on the matrimonial offence into what were virtually judgements on the state of the marriages in question. Accordingly, they came to the conclusion that, whatever the legal theory might be, legal practice was moving, in line with society as a whole, towards the concept of the breakdown of marriage. Since they had no reason to suppose that the doctrine of breakdown of marriage would favour 'divorce by consent' (in the strictest sense) nor that it would be incompatible with a covenant of lifelong intention, they arrived at their fundamental recommendation: 'that the doctrine of the breakdown of marriage should be comprehensively substituted for the doctrine of the matrimonial offence as the basis of all divorce'.²⁵ In making this recommendation the Group were well aware of the possibility of injustice against the non-offending spouse, but felt the public interest required as a general rule that

'empty' legal ties be dissolved.

So, within the space of some three years the Church of England had completely reviewed its position on divorce law and had come to embrace the doctrine of the breakdown of marriage as the basis for divorce, albeit accompanied by alterations to the administration of the law. These alterations were cumbersome to say the least, and in reality inoperable. However, the important breakthrough was that the principal^{LE} of breakdown had been accepted. As a consequence the Report was well received. A leader in 'The Times' expressed sympathy with its ideas;

'It is doubtful whether there has been published in recent times a more persuasive, thoughtful or constructive plea on behalf of the breakdown of marriage doctrine or a more effective condemnation of the present method of divorce'.²⁶

Not surprisingly, the principles of 'Putting Asunder' were also welcomed by the Divorce Law Reform Union, as well as by Leo Abse. Nevertheless, Mr. Abse was not unaware of the publication's shortcomings as he was later to explain:

'I did not mock this report. The candour with which the matrimonial offence was condemned meant that the theological apologia which for centuries had buttressed the doctrine was ended. The alternative solution proffered was so ramshackle that it would collapse under its own weight. It was demanding a revolution in the whole *modus operandi* of judges and lawyers, and the legal establishment is not given to such flightiness....'.²⁷

Indeed, the legal establishment was not given to such flightiness. 'Putting Asunder', immediately after its publication in July, was referred by the Lord Chancellor, Lord Gardiner, to the newly established Law Commission for their advice. Within four months, by the November of 1966, the Law Commission had completed its deliberations and produced a wide-ranging commentary, 'The Field of Choice'.²⁸

Right at the outset, the Law Commission outlined the objectives it thought a good divorce law should seek to achieve. Firstly, it should buttress, rather than undermine, the stability of marriage; and secondly, when in the regrettable circumstances that a marriage did irretrievably break down, it should enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation. Thus, it was against these objectives that the existing law and possible reform options were to be judged.

The Law Commission had little sympathy with the divorce law as it then stood on the grounds that it failed to achieve adequately the objectives of good divorce law as they had set them out. It did not do all it might to aid the stability of marriage, tending to discourage attempts at reconciliation. Nor did it enable all dead marriages to be buried, and those that it did bury were not always interred with the minimum of distress and humiliation. Further, the insistence on guilt and innocence tended to embitter relationships, with particularly damaging results to the children. In sum, its principles were widely regarded as hypocritical.

In light of this, the report proceeded to outline four main proposals for consideration - I. Breakdown with Inquest; II. Breakdown without Inquest; III. Divorce by Consent; IV. The Separation Ground.

As regards proposal I it was felt public opinion would be unlikely to consider it an improvement if in every case the whole matrimonial history were ventilated in public. The Commission was forced to conclude that the proposal could not be made to work because of purely practical difficulties.

The Commission though, considered the concept of breakdown of marriage 'of such importance and value' that it proposed the scheme of Breakdown without Inquest to overcome some of the difficulties of

the Archbishop's Group's recommendations.

Under the alternative proposal, the court, *on proof of a period of separation*, would assume that the marriage had broken down and, in the absence of evidence to the contrary, that there was no reasonable prospect of a reconciliation, and there was no reason of public policy, including in particular justice to the parties and the children, why the marriage should not be dissolved. The court would then be left to judge the appropriate consequential arrangements to be made regarding the parties and the children. However, the Law Commission conceded that the fixing of a suitable period of separation as a precondition of the right to file a petition presented the greatest difficulty in the way of the scheme. It was felt that if prompt relief was to continue to be given in cases of outrageous conduct, no period of much more than six months prior to the filing of the petition could be regarded as a feasible timespan were breakdown to become the sole ground for divorce. The Commissioners emphasised that if as short a period as this was regarded as unacceptable, then the proposal would cease to be a practical one.

The third option considered was that of Divorce by Consent. Here the report pointed out that even staunch supporters of Divorce by Consent conceded that the case for it was very much weaker when children were involved. This proposal was to be confined to those instances where no dependent children were involved and where there were dependent children no divorce was to be granted. The Law Commission however, felt that such an extreme differentiation between marriages with children and those without would be both unacceptable and undesirable.

The last of the options to be considered in 'The Field of Choice' was the Separation Ground. This additional ground of divorce was

based on a number of years separation. The intention behind it was to give recognition to the principle that where a marriage had irretrievably broken down it should be dissolved irrespective of guilt or innocence. This would be achieved not by making breakdown one comprehensive ground for divorce but by retaining the grounds based on the matrimonial offence and adding the separation ground to them. One of the main difficulties in this proposal was to fix a period which was not so short that it might undermine the stability of marriage, but not so long that parties who had grounds for petitioning on the basis of a matrimonial offence would not be prepared to wait. The Law Commission reached the conclusion that if the Separation Ground was to be introduced there should be two different periods of separation. The longer one, of perhaps five years, should operate when the respondent objected to a divorce. The shorter, perhaps two years should operate where the other spouse did not object or consented to the divorce. The Commissioners, however, drew attention to the fact that the Archbishop's Group expressed very strong objections to the introduction of the breakdown principle as an addition to, instead of a substitute for, the principle of matrimonial offence, for reasons of mutual incompatibility of the two principles. The view of the Law Commission though, was that it was perhaps not necessary to make an exclusive choice between the two as the legal system frequently chose different principles to dispose of distinguishable situations.

All of these ideas, then, were considered and discussed in a debate in the House of Lords in November 1966. Initiating the debate the Lord Bishop of Exeter pointed out that the courts were, in practice, acting not so much on the ground of matrimonial offence, but were increasingly passing judgements based on the ground that the

marriage had irretrievably broken down. What was needed was a radical reform to remove the most unsatisfactory features of the system and this, he believed, was supported by public opinion which, on the whole now agreed that the divorce laws should be made more realistic and more humane. The public did not want easier divorce, but it did want more sensible divorce, he opined.

The Archbishop of Canterbury, supporting the principle of the breakdown of marriage as the basis for divorce, pointed the way forward to a possible solution when he urged that 'the authors of "Putting Asunder" and the Law Commission might together try to bridge the gap between what is called, on the one hand, breakdown with inquest, and, on the other hand, breakdown without inquest'.²⁹ Support was forthcoming from Lord Soper, speaking on behalf of the Free Churches, as it was from the Earl of Iddesleigh, a Roman Catholic, who recognised and appreciated the need for divorce in society, although, of course, not for him or those of his persuasion. However, not all of their noble Lordships spoke in favour of reform, the most vociferous opponent being Baroness Summerskill who spoke with deep concern about the plight of the discarded wife and her problems of inequality and economic insecurity. Speaking 'more in sorrow than in anger', she criticised the Archbishop's Group for having produced 'a curious and disappointing document called "Putting Asunder", in which they have failed to recognise that the stability of the family should have governed all their thinking'.³⁰

In a different vein, the concern of Lord Silkin was with the legislative enactment of any reform. While he was not in favour of the Government itself introducing legislation, on the grounds that to do so would inevitably split the Government and perhaps even cause its downfall, his comments highlight the ambivalent nature of

Government 'neutrality' already alluded to in Chapter 3.

'This is essentially a matter for a Private Member's Bill, with free speech, plenty of time given for a discussion and a free vote. It is no good letting a private Member introduce a measure one Friday afternoon, if he is successful in the ballot, and leave it at that - I think most of us have agreed that the law is in need of some kind of revision, and I would suggest that if the Government would encourage some private Member to introduce a Bill, and would give ample time for discussion, it would be the best way of revising it'.³¹

To resolve their differences a series of meetings occurred between the Archbishop's Group and the Law Commission in the summer of 1967. The outcome was an ingenious compromise. The breakdown of marriage was to be the grounds on which a divorce was granted; however, the old standard matrimonial offences were to remain, although not as offences, but as evidence of the breakdown. Divorce after separation of two years was to become available by mutual consent, and after five years' separation, subject to financial safeguards, divorce would be possible even against the wishes of one of the parties. Thus, the basic principles agreed, the way seemed clear for new divorce legislation.

Parliamentary Activity: The English Reform

Leo Abse, still the parliamentary driving force behind divorce law reform, was later to write of this period in late 1967:

'With the established Church and secular reformers thus agreed, with the Law Commissioners engaged on the sophisticated task of drafting the Bill, with the Labour Cabinet via the Lord Chancellor at least silenced if not tacitly in support; with my friend John Silkin Chief Whip in the Commons and my old ally Lord Shackleton now Leader of the Lords, the work of turning the consensus into legislation seemed a simple political task'.³²

However, as it transpired it was to be far from a simple political task, despite the good fortune of finding a sympathetic formal sponsor in William Wilson (Lab. Coventry South). He had won fourth place in

the ballot which entitled him to an early Friday - the day allocated for Private Member's Bills - in the parliamentary session. Wilson did not claim as early a Friday as he might have done for two legitimate reasons. Firstly, preparations on the Bill were still being carried out with the Law Commission working to finalise the draft, and secondly, Wilson had committed himself to a parliamentary trip to India. So in his absence the Bill was launched by Leo Abse at a press conference in January 1968 to a sympathetic though reserved, reception. 'The Times', the next day, wrote:

'There is a great deal to be said for changing the law so that the sole ground for divorce should be that the marriage has broken down irretrievably. That is what the Divorce Reform Bill purports to do. But there has been such an obvious attempt to accommodate differing shades of opinion, to express a new consensus, that the result is an uneasy compromise'.³³

In the days immediately following the launch of the Bill there occurred a heated exchange between Abse and the Archbishop of Canterbury. The Archbishop issued a statement regretting the Bill's proposals to retain and enlarge the existing grounds of divorce. Abse publicly accused him of a breach of faith, criticising him for reneging on his commitment to divorce after two years separation. However, it transpired that the Archbishop had expressly declined to approve or disapprove the separation ground when it was presented to him in order to keep his options open. Abse was later to describe the Archbishop as 'the wily prelate ... following the principles of Machiavelli'.³⁴ The storm though, was to blow over quickly as the Bishop of Exeter brought Church opposition under control.

The Bill obtained a Second Reading in February by a comfortable majority and proceeded to a Standing Committee where its supporters had a corresponding majority. 'The Times' wrote perceptively that

the Second Reading majority reflected 'MPs' approval of its principle, rather than their liking for all its provisions or their confidence about its practical results'.³⁵

So it proved to be. The Bill, due to its complex nature and the wide range of opinion that existed in Committee, required thirteen sittings. Professor Richards has commented that 'the shades of opinion on the Standing Committee had a glorious but confusing variety'.³⁶ Opponents of the Bill could not agree with each other, nor could its supporters find common ground amongst themselves. So while the Committee adopted the breakdown of marriage principle without a division, the detailed application of the principle was attacked by those who wished it to be both more and less restrictive.

The principal opposition to a number of the proposals in the Bill came from the women's organisations. 'The Times' reported in April 'the opposition of almost all the main women's organisations representing nearly two million women, and an impressive array of public figures, including Lady Summerskill and the Archbishop of Canterbury'.³⁷ They were applying pressure through petitions, memoranda and direct lobbying. Leo Abse was to record that 'with all the misgivings of the middle class women's lobby being ventilated, the whole proceedings took longer than ... anticipated'.³⁸

It was not then, until late in May that the Bill emerged out of committee to be reported to a House that had run out of private members' time and which was overflowing with a flood of governmental legislation. With no further parliamentary time available the Bill was effectively lost. Even if the Commons could have found time to deal with the Bill before the summer recess it would have been difficult to have arranged for adequate consideration by the Lords. All Abse could do was to plan for the following session.

In the parliamentary time available to him, Abse publicised his failure and organised an effective campaign of protest to highlight the fate of the Bill. He argued that it was intolerable that a measure which had been extensively debated and enjoyed almost overwhelming support should be delayed by the technicalities of the parliamentary timetable. The campaign was given favourable media coverage and in the July of 1968 it had its effect when the Government gave him an assurance that if the Bill was reintroduced in the next session time would be found for its completion.

Of course, the reintroduction of the Bill was once more dependent on the private members' ballot. On this occasion, none of the first eight named MPs were amenable to sponsoring Abse's measure and it is only the first eight that are guaranteed full Second Reading debates for their Bills. Fortuitously though, the ninth named Member was Alec Jones (Lab. Rhondda West) who was agreeable to adopting the Bill. However, being ninth in the ballot meant that there was no certainty of securing adequate time to obtain a Second Reading. Therefore, it became essential to select carefully one of the days to be used by a Member having priority whose Bill was relatively uncontroversial, so that the time remaining on that day could be used to start a Second Reading debate on the Divorce Bill. Once started it was Abse's intention to pressurise the Government into allocating the time it had already promised. This ploy worked admirably. After the Bill was introduced on December 6th, Abse managed to persuade Ministers to allow the debate to continue. In accordance with Standing Orders, a motion was moved and carried to permit a morning sitting, and on December 17th the debate was resumed and a Second Reading obtained by 183 to 106 votes.

Opponents of the measure, however, protested against the Government provision of additional time. So much so that when the Bill was going through its Report Stage in June 1969 a full scale procedural debate was initiated by Sir Lionel Heald (Cons. Chertsey) on the question of the Government's handling of the issue. He moved a procedural motion just before the Bill was to complete its passage through the Commons at an all night sitting. His motion was that the Divorce Bill was being given preference and priority over all other Private Members' Bills despite the Government's professed neutrality towards the contents of the Bill and despite their refusal to accept it as Government business or to accept any responsibility for it. The motion declared:

'that such action by the Government is in contravention of Standing Order No. 15, is unconstitutional, and constitutes a grave abuse of Parliamentary procedure by the Executive'.³⁹

Heald presented his case around Standing Order 15 which provided for two kinds of business in the House, Government business and Private Members' business. His argument revolved around the question of the status of a Private Members' Bill on which the Government professed neutrality, but which appeared on the Order Paper marked with an asterisk, the customary indication that it was Government business. On the grounds that there can be no third kind of business his assertion was that either the Government must adopt it as Government business and therefore accept responsibility for it, or leave it as Private Members' Business, in which case they had no grounds for elevating the Bill above any of the other Private Members' Bills down for consideration.

The motion, however, was viewed by Michael Foot (Lab. Ebbw Vale) as a wrecking resolution designed to prevent the progress of the Bill. He highlighted at least one precedent in A. P. Herbert's Matrimonial

Causes Bill of 1937 which received time from the Conservative Government of the period to complete its stages. This, he felt, was a perfectly reasonable conclusion for both previous Governments and the present Government to have come to. He contended:

'The Government are not abandoning their neutrality. All that they are saying, and it is a very common sense thing, is that the House has a right to make up its mind on the subject'.⁴⁰

On the other hand, Enoch Powell (Cons. Wolverhampton S.W.) took the view that the Government was exercising power without responsibility. He accused the Government of promoting a legislative result without submitting themselves to the normal channels of accountability through which they can be held responsible for their actions. As such he thought the procedure an abuse of the principle and philosophy of Standing Order No. 15.

Michael English (Lab. Nottingham West) though, posed a pertinent question by asking what procedure was available other than the one adopted by the Government?

'... if hon. Members object to the system whereby time has been given to this Bill, it is not their duty merely to suggest that the Government are wrong in giving time on behalf of the country and of the House, but to suggest that the House should have a better system for determining how Bills of this controversial nature should come before it'.⁴¹

The Government's position was explained by Fred Peart, the Leader of the House of Commons. He suggested that the most comparable and recent precedent was the Divorce (Scotland) Act 1964 which was heard after 10 p.m. at the end of a day's business through an announcement of the Leader of the House at business question time. He took the view that the Government was right, and indeed had a duty, to enable the House to make up its mind on important matters which affected the community, which were not of a party kind, but were moral in

nature, and on which opinion in the country at large expressed concern. He felt that it was not incompatible for the Government to exercise neutrality while at the same time providing time for Parliament to reach a decision on the issue.

When the Question was put, the motion was defeated by 166 votes to 62, and the debate on the substance of the Bill was resumed. However this motion and the placing of the Bill on a Thursday night by Bob Mellish, the new Chief Whip, left Leo Abse a bitter and angry man. He later wrote of his feeling thus:

'I expressed my resentment against Mellish both privately and publicly when, during the debate on Heald's motion, I poured withering scorn on him in a manner to which Chief Whips are unaccustomed'.⁴²

The style of this 'withering scorn' took the form of Abse's customary caustic wit. He regaled the Commons:

'I would not say that when the right hon. and learned Member for Chertsey (Sir Lionel Heald) tabled the motion, he intended it to be a wrecking proposal. I suspect that the right hon. and learned Gentleman's innocence is equalled only by the innocence of the Government Chief Whip who, with great magnanimity, saw to it that this Motion would come up for discussion at this late hour, and before the Bill. I am certain that the right. hon. and learned Gentleman, who is deeply interested in constitutional questions, is genuinely committed to a search for the aetiology of the asterisk, a matter about which he spoke with great skill. I am equally certain that the Chief Whip wanted to be sure that equity would be shown in every respect of those who take an opposing view to the sponsors of the Bill'.⁴³

The problem for Abse lay in maintaining a core of supporters throughout the night and into the following afternoon to act as Lobby fodder. The vital need was not simply to outnumber his opponents but to keep a minimum of one hundred supporters on hand so that, when necessary, authority could be obtained to hold a division. Although several of the amendments seeking to restrict the scope for divorce

were put to the vote, they were successfully defeated by Abse's stoical supporters and by the mid-afternoon of the 13th June, after some sixteen hours of debate, the Bill had been Reported, received its Third Reading and was ready to be passed to the Lords. It was a remarkable achievement of stamina for the sponsors of the Bill against the filibustering arguments of the opposition. Abse was later to reflect philosophically:

'Politics is not the art of the possible: that is its most menial function. Politics is the art of the impossible, and real achievement comes to those who do not submit to the obvious'.⁴⁴

Meanwhile a new factor had appeared on the scene in the form of the Matrimonial Property Bill sponsored by Edward Bishop (Lab. Newark). Bishop had won third place in the ballot and had decided to introduce a Bill which would make fundamental changes in the law of property. Basically this Bill proposed that when a marriage ended in death, divorce or separation, the husband and wife would each retain anything they brought into the marriage and anything they were individually given or inherited during it, but all other resources and property accumulated during the marriage would be split equally. Moreover, although property which a spouse acquired during the marriage by gift or inheritance would belong solely to that spouse, any increase in the value of such separate property during marriage was to be treated as belonging to the spouses equally.

The Bill, however, was a confusing affair and it was criticised by the Law Commission as being completely unmanageable. Not only were there technical defects but some of the provisions could conceivably contribute to increasing rather than diminishing marital stress. The Law Officers, who were in the process of reviewing the whole field of family property, argued forcefully that the legislation should be

postponed until the Commission had completed its study. Sharing this view the Government predictably, but mistakenly, placed a whip on to ensure its defeat. However, such was the support of women's organisations throughout the country and among backbench Labour MPs, that the whips had to be taken off and the Bill obtained a Second Reading on a free vote.

The effect of all this was that the Matrimonial Property Bill now straddled the Divorce Bill's path to the statute book and the two issues became bound up together. It was not that the divorce reformers were not sympathetic to the intentions of the Bill, for there was widespread agreement on the need to provide additional financial safeguards for divorcees. It was more that they were dismayed by the practical implications of the Bill and were concerned by the prospect of it delaying the implementation of the Divorce Bill.

Bishop subsequently agreed to withdraw his Bill in return for a promise of legislation in the following session, but the apprehension of the divorce reformers proved justified. Opinion was building that no Divorce Bill should be passed until a Property Bill had been considered and enacted by Parliament. In the event, to gain the Lord's approval the sponsors of the Bill had no choice but to agree that the Divorce Bill should not come into effect for a year to enable a Matrimonial Property Bill to be enacted by the Lord Chancellor which would come into operation at the same time, 1st January 1971.

Professor Richards has posed the question why was the parliamentary campaign on the Divorce Bill so protracted when all the general pressures of opinion and organisation tended to favour the Bill? He has shown that public opinion polls revealed a firm majority in support of reform. A Gallup Survey in January 1968 illustrated that 70% approved of divorce after two years separation where both spouses

consented, with only 17% disapproving, while 13% were 'don't knows'. Unilateral divorce after 5 years' separation was approved by 56%, with 26% disapproving and 18% non-committal. For Professor Richards then:

'... the delay had two main causes. The technicalities and the flukes of the parliamentary timetable helped to destroy the Wilson Bill. The other and fundamental difficulty was the intricacy of the subject ... Apart from religious and moral controversy, questions were raised involving legal procedure, child welfare, social security and property law. The limited ration of time allowed for private members' Bills can scarcely be expected to accommodate a measure that arouses such a galaxy of argument'.⁴⁵

Although Richards takes into consideration the opposition of the large number of women's organisations, he plays down their collective impact because of a lack of unity in their views. Individual organisations opposed the Bill on different grounds and for different reasons 'so female dissatisfaction was divided'.⁴⁶ Abse, on the other hand, while concurring with Richards' overall diagnosis, places a much greater emphasis on the role of women in opposing the Bill. He reveals:

'the avalanche of protest, anxiety and vituperation, mainly coming from middle aged, middle class deserted wives, that I endured with each post taught me that all the compromises, additions and alterations we could make in the Bill could not give to these sad women the emotional security they sought'.⁴⁷

Charting the progress of the reform from the early to the late sixties, he commented:

'Attempting social legislation in a society in transition is a more complex and bewildering task than altering the laws of a more stable community: the politician today is legislating on a moving staircase, and society had moved a long distance since 1963. The theological objections and anxieties had been overcome: but new anxieties were abroad. The relative status of male and female with the family has lost its old definitions: husband and wife no longer had their confident roles, and women, having cut adrift from their old intolerable moorings, had a quest but no certain destination. All the floating suspended

anxiety of women suffering a crisis of identity was, for two arduous parliamentary sessions, to rest, suffocatingly upon the Divorce Bill'.⁴⁸

In Abse's estimation then, the real wonder of it was that the Bill ever reached the statute book at all.

(b) Scotland

It has been noted earlier that the historical development of the divorce laws in England and Scotland has been markedly different. However, the respective divorce reforms of 1937 and 1938 brought the laws of the two countries roughly into line with regard to the grounds upon which divorce could be granted, although still maintaining a distinction as set by legal tradition and procedure. In a similar fashion the Morton Commission of 1955 applied not only to England and Wales, but also to Scotland, and its main recommendations, on the principles of divorce at least, applied to both sides of the Border. And as we shall see presently, in the mid-60s the Scottish Law Commission 'shadowed' its counterpart in England, and both reports reached much the same conclusions. The modern trend could thus be described as being one of maintaining distinctiveness in legal practice, but minimising differences in principle so as to make the law broadly comparable north and south of the border.

One important indicator of changing attitudes to divorce in Scotland in the 1950s and 1960s was the shift in thinking of the Church of Scotland. In 1957 the General Assembly resolved to send to the Presbyteries for discussion and comment the Report of the Special Committee on the Re-marriage of Divorced Persons. The Presbyteries were requested to give their considered opinion on the doctrine of marriage set forth in the Report, the definition of the Church's attitude to divorce, and the duties of ministers to divorced persons

seeking re-marriage in Church. A year later, in May 1958, the Committee reported back the range of replies and recommendations received. In general the Presbyteries found the proposals made by the Committee acceptable. The Christian doctrine of marriage, that it was not only a legal bond and a natural tie, but an act of God, was accepted unanimously. Also re-affirmed unanimously was the recommendation that 'the grounds set forth in the Act of 1938 be approved, on the principle that these grounds, and the matrimonial offences detailed in the Act, are such as may be so grievous and may so damage and make a mockery of the union of husband and wife as to cause one party, relying on the mercy of God, to seek the termination of the marriage'.⁴⁹ Lastly, on the question of re-marriage, it was recommended by a substantial majority, that while no minister should be required to solemnise a marriage against his conscience, the re-marriage of innocent parties to a divorce by a minister of the Church should be permitted, but not the re-marriage of guilty parties.

Church of Scotland thinking on the issue in the fifties then, was still firmly entrenched in the concept of the matrimonial offence. While the Church recognised the need for, and permitted, the secular dissolution of marriage, it still insisted on the labels of 'guilt' and 'innocence' being attributed to spouses in a divorce action. So much so that in cases where divorced persons wished to remarry, the minister had to obtain adequate information concerning 'the life and character of the parties to be remarried' and the circumstances of the divorce case, and further he should 'consider whether there is a danger of scandal arising if he solemnise the re-marriage'.⁵⁰ This type of thinking within the Church was to prevail for the next ten years.

In the interim period in the early sixties, there was little activity on the divorce issue with the exception of the Divorce

(Scotland) Act 1964. This was an enactment to amend the divorce laws of Scotland to facilitate reconciliation and to confer new powers on the courts to award interim aliment. The provisions were modest, and came as a response to the Abse legislation of 1963. However, the reform proved to be controversial for the manner in which it was passed through Parliament.

The Bill had been introduced in the Lords on 16th January 1964 by Viscount Colville of Culross and had passed through that House with little discussion by the Spring. On its arrival in the Commons it was sponsored by Forbes Hendry, the Member for Aberdeenshire West, but it became caught up in the backlog of all the other private members' business. So with the parliamentary session drawing to a close, the Government decided to take the rather dramatic step of assisting its passage. This had the effect of causing a procedural uproar.

After an unopposed Second Reading it went to the Scottish Standing Committee where, on 30th June, Lady Tweedsmuir, the Under Secretary of State, explained the Government's intentions towards the Parliamentary timetable:

'It will not have escaped the notice of hon. Members that last Friday was what is commonly called in Parliamentary terms Black Friday, when Private Members' Bills normally fall if they have not completed their stages. Therefore, the Government felt that, as there was time in the Scottish Standing Committee, it should be given an opportunity to consider this Bill which has been waiting in the wings since March. It has already been considered in another place, and has also had an unopposed Second Reading on the Floor of the House of Commons. Should it be reported, the Government will consider whether facilities can be available for its remaining stages'.⁵¹

At issue was a Sittings Motion to enable the Committee to meet for four sittings within the week so as to allow enough time for consideration of the Bill. Such an idea, however, was bitterly opposed by the Labour Members on the Committee. Willie Hamilton (Lab. Fife

Central) protested that this was 'an outrageous way to treat Scottish members' and indicated that he would not be co-operating, not because he did not favour some of the provisions, 'but because of the squalid approach by the Government in attempting to bulldoze the Bill through the Committee'.⁵² Similarly, Willie Ross (Lab. Kilmarnock) launched into an attack - 'The Royal Commission took four years on this, but the Scottish Committee is given four sittings. This is a contemptible attitude towards Parliament and to the Royal Commission - and indeed to the subject'.⁵³

A number of Members were of the opinion that there was no demand for the Bill by the people of Scotland and suspected that ulterior motives lay behind its introduction. George Lawson (Lab. Motherwell), for instance, was convinced that it was the intention of a Tory Government in low morale to embarrass the Scottish Labour Party with the Bill. He asserted:

'Some members of the Government, I do not know at what level, hope that the religious differences in Scotland as affected by this matter, will reflect adversely on us. They are exploiting religious conflicts and ideas in order to embarrass us'.⁵⁴

On the question of adequate discussion of the Bill, Dr. J. Dickson Mabon (Lab. Greenock and Port Glasgow) contended that it had not been given a fair hearing among the people of Scotland. It was unacknowledged by the Roman and Protestant Churches in Scotland and, as far as he was aware, the many secular organisations concerned with social law had not been consulted. What demand there was for the reform appeared to emanate from a handful of lawyers.

Willie Hamilton, once again sought to enlighten the Committee about Scottish attitudes towards the subject. Relaying the factual information that since the Royal Commission Report of 1956 some 15 Bills had been presented in both the Commons and the Lords, he

proceeded to make the point that 'not one was introduced by a Scottish Member of the House of Commons or a Scottish peer'.⁵⁵ This, he implied, was indicative of Scottish feeling on the subject.

Nevertheless, despite the protests the Sittings Motion was accepted by 11 votes to 7 and the Bill did pass through its committee stage in four sittings, although the last one was an open ended afternoon sitting which lasted some ten hours.

What is interesting about these exchanges is the manner in which an essentially non-party political issue became the vehicle for political comment and criticism. It is difficult to establish exactly what the Conservative motivation might have been but it would seem to have involved three possible factors. Either there was genuine feeling that this was a worthwhile measure to get through in the time available, or it was simply a political expedient to follow the English measure with a similar Scottish provision in order to keep the law on either side of the border roughly compatible, or it was a cleverly contrived exercise to place Scottish Labour MPs in an awkward position before a pending election. These factors are not mutually exclusive and so it could have been any one, or any combination, of the three. Given the modest provisions of the Bill perhaps the most plausible account is that it was merely a way of extending to Scotland those provisions for reconciliation which had already come into effect in English law in 1963. Any political inconvenience it might have caused the Labour Party in Scotland would naturally be viewed by the Tory administration as a beneficial side-effect.

Perhaps though it was not so much what the Conservative Government intended as what Labour MPs in Scotland believed they intended. They ascribed to the Government all sorts of Machiavellian doings on the issue. It was thought that the Tories were trying to create the

impression that they were a modernising party and in so doing put the Opposition in the position of obstructing what could be regarded as a progressive measure. It was quite clear that there was opposition to the Bill among certain Labour MPs ranging from outright hostility to mild reservation, but, for fear of appearing unnecessarily obstructionist, they had to couch their opposition in terms of procedural outcries and sittings motions concerning the curtailment of debate. Pursuing such a course of action tended, on occasion, to get them tied in knots. For instance, it was claimed in one breath that the Bill was a Tory ploy to divert Scotland's attention from more important matters such as the economic troubles of Scottish industry, while in the next breath it was argued that there was no interest in Scotland in such a Bill. As for the question of exploiting religious conflicts, whether it was real or not was not so important as the fact that some Labour MPs perceived it as being real. Consequently, it tended to reveal more about the personal insecurities and anxieties of those MPs than it did about anything else.

In keeping with their commitment the Government duly found the parliamentary time to assist the Bill in its later stages by allocating a slot at the end of the day's business on 21st June. Within an hour and a half the Bill was reported and given a Third Reading. The effect of the measure, as noted earlier, was to extend to Scotland the provisions for reconciliation already extant in English law.

While it was at this time in England that the level of debate on the divorce issue began to warm up, there was no corresponding upsurge of interest in the Scottish context. England to a great extent took the lead on the issue and this may be best explained by the fact that as discussion was concentrated on the principle of divorce it was applicable to both sides of the border. Viewed in

this perspective the Scottish Law Commission's Report of 1967 can be seen as an attempt to adapt the broad principles thrashed out in the English debate into the Scottish context.

In late December 1966, the Scottish Law Commission was invited by the Secretary of State to review, in relation to Scotland, the ground covered by 'The Field of Choice' and 'Putting Asunder'. Their report, 'Divorce: The Grounds Considered', was published some five months later in May 1967, and examined all the possible options in the Scottish context. Although at the outset they emphasised the difference in Scottish legal background and tradition, they accepted that much of the debate concerning the principles of divorce were relevant to, and with some modification, could be applied to, Scottish practice. They wrote that 'Putting Asunder', 'puts in issue some of the fundamental assumptions of the law of divorce in England and Wales, and these are fundamental assumptions of the existing law of Scotland also'.⁵⁶ With one of these fundamental assumptions they agreed - that divorce should not be regarded as a punitive measure, but rather as a recognition that a marriage was dead and ought to be buried with the minimum of embarrassment, humiliation and bitterness. However, they pointed out that there was nothing inconsistent about adding to the existing grounds another ground, viz. irretrievable breakdown. The law of Scotland set out a series of peremptory grounds of divorce not all of which could be classified as matrimonial offences, such as incurable insanity and injurious conduct committed under the influence of mental disease. So Scotland (like England) did not have an exclusively punitive approach to the problem. The addition of irretrievable breakdown would not mean then, as 'Putting Asunder' suggested, that the new ground would be incompatible in the respect that it was being added to a class of other grounds all of which

exhibited the characteristic of an offence. The result would simply be that the grounds of divorce, taken as a whole, would have the one thing in common, that upon proof of any of them, the court would dissolve the marriage.

On the breakdown of marriage the Report commented:

'Every action of divorce is now brought *because* a marriage has irretrievably broken down, though not *on the ground of* the breakdown. Marriage being, as a minimum, a partnership, it is enough that one partner maintains irretrievable breakdown for the breakdown to be a fact, however strenuously and sincerely it may be denied by the other partner'.⁵⁷

However, it was pointed out that irretrievable breakdown, being an essential of every application for divorce, could not usefully be made a ground of divorce in the sense of being the subject matter on which the court, in deciding whether the marriage is to be dissolved or not, should come to a conclusion. Accordingly, it was recommended that the existing grounds of divorce be retained, their legal significance being, that if a party could prove one of these grounds, then there would arise an irrebuttable presumption that the marriage had irretrievably broken down, and should be dissolved. The 'separation ground' could then be added to cover cases where the fact of the parties having lived separate lives for a stated period of time was evidence that the marriage had broken down. The Report stated:

'It may be assumed that generally, when spouses have for a number of years voluntarily lived separately because they cannot live happily together, their marriage has irretrievably broken down, and that that is true whether or not the separation was a consensual one'.⁵⁸

The question though, arose as to what constituted an appropriate length of separation where, firstly, both spouses consented or did not oppose the dissolution of the marriage and, secondly, where one of the spouses was opposed to the dissolution. In the first instance where

both parties consented or acquiesced, the Scottish Law Commission adopted the view of its English counterpart and recommended a period of two years. In the case where there was opposition from one spouse, the Report again concurred that the situation required that the length of separation be longer than the two year period. It did not, however, state a specific period of time because of 'the fact that the length of period is not a question of logic or legal policy but of social and political expediency, and therefore ultimately to be decided by Parliament itself'.⁵⁹

In sum then, the conclusions reached by the Scottish Law Commission were in the main very similar to those hammered out south of the border by the joint delegation from the Law Commission and the Archbishop's Group. While there were, of course, differences in detail as a consequence of the different legal traditions and practice, there was a broad concurrence on the fundamental principles upon which divorce law should be based. Divorce was to be granted upon proof of one of the several grounds for divorce. Included in those grounds would be the new ground of separation, where divorce would be available after a period of two years' separation when both spouses consented or acquiesced, or after a period of (say) five years when one spouse objected, subject, of course, to certain safeguards.

Thus, by mid-1967, on both sides of the border, the basic principles for the reform of the divorce laws had been spelled out.

Also at around this time in 1967, as a consequence of the English initiative, attitudes within the Church of Scotland were beginning to shift and fresh thinking on the issue was becoming apparent.

In the April of that year a Working Group was set up to enquire into the existing grounds for divorce and to determine whether there

was any need for a reform in the law. The enquiry was established as a response to four pressing factors - I. the rise of the divorce rate in the United Kingdom in the sixties; II. the concern of the legal profession about the abuses of the existing system; III the persistent attempts by sections of society to bring about radical change; IV. the toll of human misery, either leading to, or as a consequence of, divorce in its existing form. It was stated:

'Christian compassion demands a study of the situation with a view to discovering some degree of remedy for and alleviation of such suffering'.⁶⁰

The Report of this Working Group on divorce law reform was presented to the General Assembly for consideration in May 1968. At the outset it was recognised as being only honest to acknowledge that when a marriage had collapsed to the point of being an empty shell it ought to be decently buried. As a means of doing that the Report argued that the existing grounds for ending a marriage were inadequate and unsatisfactory. Three main reasons were enunciated as being responsible for this state of affairs. Firstly, the matrimonial offences listed as 'grounds' were more the results than the causes of marriage breakdown. As such it was unfair to use such offences as hard and fast proof that one partner was guilty and the other innocent in so far as legal guilt might not adequately reflect the moral realities of the situation. Secondly, the application of this accusatorial principle lent itself to manipulation, insincerity and dishonesty. It tended to incite one party to distort or exaggerate the conduct of the other resulting in a deepening of the bitterness between them and minimising the possibilities of reconciliation. Thirdly, it required an action at law to be taken by the legally innocent party, but if that party refused to sue for divorce the empty shell of a marriage was perpetuated, leading to all sorts of frustrations and hardships.

After reviewing and commenting on the various proposals put forward by the other bodies in the debate - the Church of England, the Law Commission and the Scottish Law Commission - the Church of Scotland Report reached its own quite independent conclusions. The Report agreed that divorce should be granted on the ground of breakdown of marriage as against the need to prove certain matrimonial offences, the view being taken that such matrimonial offences were often the outcome rather than the cause of a deteriorating marriage. It was recommended that separation for a continuous period of at least two years, consequent upon a decision of at least one of the parties not to live with the other, should act as the sole evidence of marriage breakdown. This time period was considered long enough to be reasonably certain that breakdown had really occurred, but it would also afford time for the opportunity of reconciliation. Attempted reconciliation of at least three months was to be permitted without it having an effect on the period of two years continuous separation. Divorce on this ground would be available to both or either party. Safeguards, of course, would prevail and the Court should be satisfied as regards the financial provisions relating to the spouses and children, and the provisions for the welfare of the children.

These proposals were amongst the most radical to have emerged during the entire course of debate on the issue and they marked a pronounced swing in the Kirk's thinking, a fact which did not go unrecognised in the Report. The Report observed:

'We are very conscious that these proposals constitute a quite radical departure from the standpoint of the "Commission on Re-marriage of Divorced Persons" accepted by the General Assembly in 1958, when matrimonial offence was approved as the main ground for divorce, and when the General Assembly last pronounced

on the subject. However, we are convinced that our study within the present remit, indicates that in the changes we propose we are still being true to the spirit of the Christian ethic'.⁶¹

The General Assembly of 1968 received this Report, but reserved judgement on its conclusions and recommendations, preferring instead to send it down to the Presbyteries for study and comment. The following year the replies from the Presbyteries were reported back. Out of the 60 Home Presbyteries 58 made returns and the breakdown ran as follows: 36 accepted the principle of breakdown as the sole ground for divorce as proposed by the committee; 8 wanted the addition of separation to the existing grounds; 8 favoured no change in the law as it stood; and 6 were negative and non-committal.

Of the 8 Presbyteries which suggested adding a separation clause to the existing grounds, the committee argued that this would only make matters worse since the abuses attendant on the accusatorial principle would remain, and in addition the compulsory period of a two year separation would be compromised because there would be no one principle applied upon which divorce could be established. Some of the objecting Presbyteries considered the separation period of two years as being too short. The committee held though, that two years of separation was long enough to provide sufficient proof of breakdown, but in any case, whatever period of separation was selected, a further delay would be involved because of procedure before a divorce was actually granted. Other Presbyteries expressed concern about those cases where an intolerable situation of continual humiliation and hardship prevailed which warranted some kind of protection and relief being given without the long delay of two years. The committee's response to this was that while divorce would certainly be precluded on these grounds within the two year period, temporary

protection would still be available in the form of judicial separation.

While appreciating the concern expressed by some Presbyteries that any new proposals should not cause hardship or weaken the institution of marriage, the committee reaffirmed the proposals contained in its Report of 1968 along with one or two additions consequent upon the comments received. The General Assembly of 1969 then, received the committee's Report on Divorce Law Reform, accepted the revised proposals put forward and commended these 'to the consideration of Her Majesty's Government with a view to reform of the Divorce Law of Scotland'.⁶² Within the space of a decade the thinking of the Church of Scotland on the issue of divorce had undergone an almost revolutionary transformation.

The response of Her Majesty's Government to the request for Scottish divorce reform was non-existent. The Scottish Office adopted the traditional line that the matter was best dealt with through a Private Member's Bill. At this time, of course, there was a flurry of activity on the English reform Bills, but no one seems to have considered the position of Scotland in relation to any proposed reform. Only Donald Dewar (Lab. Aberdeen South) appeared to have been aware of the possibilities. As early as the December of 1967 he pressed the Secretary of State at Scottish Question Time for a statement on his policy on divorce reform in Scotland. Willie Ross answered with the stock response that the issue had never been thought a suitable subject for Government legislation, but if any Member wished to introduce a Bill on the basis of the Scottish Law Commission's Report, the Government would be willing to assist with the drafting. Donald Dewar, however, pointed out, rather prophetically, some of the problems that such a course of action might entail. He remarked:

'Does my right hon. Friend agree that it is very unsatisfactory, if the Private Member's Bill which has already been brought forward is enacted for England, that we in Scotland shall have to wait until an hon. Member favourably disposed to such legislation is fortunate enough to be successful in the Private Members' Ballot? That will result in a long time lag, and once again Scotland will look as though it is taking second place in the legislative train'.⁶³

David Steel (Lib. Roxburgh, Selkirk and Peebles) also pushed the Secretary of State as to whether he would give, in addition to drafting assistance, Government time in the Scottish Grand Committee for such a Bill. However, Willie Ross remained non-committal indicating that it was a matter of the luck of the draw.

The issue was again raised by Donald Dewar in December 1968 when he took the opportunity of speaking on the Divorce Reform Bill.

The tenor of his comments was much the same:

'I feel very strongly that it would be wrong and unfair if divorce law north and south of the Border rested upon a completely different social basis. If this Bill gets the kind of Second Reading that I hope it will, and it gets through to the Statute Book, I hope that the Government will give careful consideration to the best, quickest, and most efficient way of getting a suitably amended Scottish Act on the Statute Book'.⁶⁴

Twice again in 1969 Donald Dewar sought to keep the pot boiling, once in February and once in December. On both occasions he quizzed Willie Ross as to what plans he had to implement the proposals for divorce law reform contained in the Scottish Law Commission Report. Once more he pressed for action. At a Question Time just before the Christmas recess he asked:

'Does my right hon. Friend agree that it is not a matter of drafting as much as a matter of time that is at issue, and that when so many representations have been made, from the Scottish Law Commission, the Church of Scotland and the Law Society of Scotland, it would be very unsatisfactory if Scots Members were not given a chance to

come to a decision on this important matter in the same way as English Members last session?'⁶⁵

Yet again though, Willie Ross played defensively. Thus, in contrast to the position taken in the higher echelons of the Home Office, that providing additional parliamentary time was not incompatible with maintaining Government 'neutrality', the Scottish Office adhered strictly to the traditionalist view that the matter had to be dealt with through a Private Member's Bill, and that before such a Bill could proceed the will of the House in respect of the principle would have to be obtained on Second Reading.

With the end of the decade only a few days away, divorce reform as far as Scotland was concerned, was destined to become an issue of the seventies.

VI. Conclusion

The removal of the Eirene White Bill from the political agenda in the early 50s provides a good example of a 'non-decision'. The Labour administration was not politically secure and chose to avoid the electoral consequences of the issue by assigning it to a Royal Commission. This Commission in turn, which took over four years to deliberate and eschewed any of the research techniques of social science, effectively buried the issue for the remainder of the decade and beyond, with a staid and divided Report which broke no new ground, insisting instead on the retention of the principle of matrimonial offence.

The early sixties, however, saw changing attitudes. The issue was brought back to the public's attention by the dynamic personality of Leo Abse who succeeded in rekindling the debate through the introduction of Private Members' legislation. After initial hesitancy,

the Church of England responded to the changing mood and produced a radical report in 'Putting Asunder', which was quickly followed by a Law Commission critique that put the Church of England proposals into a more practical perspective. However, resistance both within and without Parliament was not yet overcome. That it eventually was overcome can be attributed largely to the astuteness and dogged persistence of Leo Abse. A comment made by A. Lawrence Lowell in the early years of this century fits him well:

'One man who holds his belief tenaciously counts for as much as several men who hold theirs weakly, because he is more aggressive and thereby compels and overawes others into apparent agreement with him, or at least into silence and inaction. This is, perhaps, especially true of moral questions'.⁶⁶

The importance of Abse's role in divorce reform cannot be stressed enough. His political astuteness, his intellect and his close personal contact with those in positions of power were vital factors in achieving reform.

That the English reform suffered a 'delay' cannot be denied. It was due to a lack of foresight on the part of the sponsors of the Jones Bill, and to residual pockets of resistance from some political churchmen and a number of women's organisations. It succeeded eventually due principally to the Government's allocation of parliamentary time, which itself was heavily dependent on Abse's harassment of those in control of the business agenda. The ensuing procedural motion sorely tested the Government's position of 'neutrality' but it highlighted the need for tacit Government approval for a Private Members' measure of this nature to succeed.

Events in Scotland were subdued. Although the reform in England was confined to that country, the debate concerning the principle of divorce law was equally applicable to Scotland. The Scottish Law

Commission reviewed the proposals emerging from England, and adapted them, while maintaining the principle, to the Scottish context. Thus, the tendency was to maintain differences in legal tradition and practice, but to minimise differences in principle. The Scottish reform of 1964 was noteworthy only in so far as it provided a precedent for the allocation of parliamentary time and for the manner in which the debate became 'politicised' in a party political sense, illustrating some of the underlying assumptions and sensitivities of some Scots Labour MPs.

The main feature of note in the Scottish sphere was the dramatic swing in the thinking of the Church of Scotland on the issue, moving from a traditionalist line in the late 50s to a radically different approach ten years later. Their initiative though, was slow to be accepted by opinion at large and consequently it fell by the wayside.

The most prophetic remark of this period however, came from Donald Dewar who with uncanny foresight predicted that unless the Government took some responsibility for providing time for a Scottish debate on the issue, there would undoubtedly be a 'long time lag' before a decision could be reached. This 'long time lag' forms the basis of the next chapter.

1. Report of the Royal Commission on Divorce and Matrimonial Causes (Gorrell Report), HMSO, 1912-13, Cd 6481, Vol. XX, p. 527.
2. *ibid.*, p. 530.
3. *ibid.*, p. 529.
4. *ibid.*, quoted at p. 541.
5. H. of C. Parl. Deb., 1950-51, Vol. 485, col. 927.
6. Peter G. Richards, *Parliament and Conscience*, London 1970, p. 136.
7. H. of C. Parl. Deb. 1950-51, Vol. 485, col. 1003.
8. *ibid.*, col. 1004.
9. Richards, *op. cit.*, p. 137.
10. O. R. McGregor, *Divorce in England*, London 1957, p. 187.
11. *ibid.*, p. 181.
12. *ibid.*, p. 184.
13. McGregor, *op. cit.*, p. 189
14. Report of the Royal Commission on Marriage and Divorce (Morton Report), HMSO 1956, Cmd 9678, p. 14, p. 17.
15. *ibid.*, p. 23.
16. *ibid.*, p. 25.
17. McGregor, *op. cit.*, p. 192.
18. H. of L. Parl. Deb. 1955-56, Vol. 199, col. 974.
19. McGregor, *op. cit.*, p. 193.
20. H. of C. Parl. Deb. 1962-63, Vol. 671, col. 806.
21. H. of C. Parl. Deb. 1962-63, Vol. 676, col. 1566.
22. Leo Abse, *Private Member*, London 1973, p. 166.
23. *ibid.*, p. 169.
24. Putting Asunder: A Divorce Law for Contemporary Society, Report of a Group appointed by the Archbishop of Canterbury, London SPCK 1966, p. 10/12.
25. *ibid.*, p. 18.
26. The Times, 29th July, 1966, Leading article, cited in Richards, *op. cit.*, p. 139.
27. Abse, *op. cit.*, p. 172.
28. The Law Commission, *Reform of the Grounds of Divorce: The Field of Choice*, HMSO 1966, Cmd 3123.
29. H. of L. Parl. Deb. 1966-67, Vol. 278, col. 274.
30. *ibid.*, col. 291.
31. *ibid.*, col. 319.
32. Abse, *op. cit.*, p. 174.

33. The Times, January 16th 1968.
34. Abse, *op. cit.*, p. 182.
35. The Times, February 10th 1968.
36. Richards, *op. cit.*, p. 148.
37. The Times, April 22nd 1968.
38. Abse, *op. cit.*, p. 183.
39. H. of C. Parl. Deb. 1968-69, Vol. 784, col. 1797.
40. *ibid.*, col. 1807.
41. *ibid.*, col. 1815.
42. Abse, *op. cit.*, p. 188
43. H. of C. Parl. Deb. 1968-69, Vol. 784, col. 1847.
44. Abse, *op. cit.*, p. 188.
45. Richards, *op. cit.*, p. 158.
46. *ibid.*, p. 156/7.
47. Abse, *op. cit.*, p. 178.
48. *ibid.*, p. 175.
49. Church of Scotland, Report of the Special Committee on the
Remarriage of Divorced Persons, May 1958, p. 1.
50. *ibid.*, p. 3/4.
51. H. of C. Parl. Deb., Standing Committees, Session 1963-64, Vol. V,
Scottish Standing Committee, 8th June, 1964, col. 3.
52. *ibid.*, col. 4.
53. *ibid.*, col. 13.
54. *ibid.*, col. 19.
55. *ibid.*, col. 30.
56. Scottish Law Commission, Divorce: The Grounds Considered, HMSO
1967, Cmd 3256, p. 2.
57. *ibid.*, p. 3.
58. *ibid.*, p. 6.
59. *ibid.*, p. 8.
60. Church of Scotland Social and Moral Welfare Board, 'Whom God
Hath Joined', Reports on Divorce Law Reform 1968 and 1969,
p. 1.
61. *ibid.*, p. 8.
62. *ibid.*, p. 19.
63. H. of C. Parl. Deb. 1967-68, Vol. 755, col. 1421.
64. H. of C. Parl. Deb. 1968-69, Vol. 775, col. 1120.
65. H. of C. Parl. Deb. 1969-70, Vol. 793, col. 1343.

66. A. Lawrence Lowell, 'Public Opinion and Popular Government', 1913, reprinted in B. Berelson and M. Janowitz, Public Opinion and Communication, 2nd Edition, Free Press, New York, 1966, p. 25.

CHAPTER 8

The Scottish Divorce Reform Attempts of the Seventies

I. Introduction

The Scottish Office adopted the traditional line that divorce was an issue which was best dealt with through Private Members' legislation. This chapter examines the sequence of Private Members' reform attempts which eventually culminated in the successful Divorce (Scotland) Act 1976.

Section II charts the various Private Members' Bills that were introduced in the Commons in the first half of the seventies and outlines the methods by which they were introduced, their sponsors and their ultimate fate. One of the main features of these debates revolved around what constituted Scottish public opinion on the divorce question. This theme is developed in Sections III, IV and V where different perspectives on public opinion are discussed. Section III looks at public opinion as represented by pressure groups, Section IV inquires into how MPs appraised public feeling and Section V reviews public sentiment as it was expressed in the media and opinion polls.

Section VI then proceeds to examine the 'politics' of the 1976 divorce reform. The crux of the matter here hinged on whether Scotland should adopt distinctive policies designed to suit its own particular requirements or whether reform should be directed towards making the law north and south of the border roughly comparable so as to allow for uniform practice throughout Great Britain.

In Section VII there is an assessment of the obstacles to reform and the swing in opinion. What were these 'obstacles'? How was the apparent 'delay' to be explained? Was there a 'swing' in public opinion? If so, how can it be accounted for? These questions are considered and some explanations offered. Section VIII then outlines some concluding remarks.

However, before progressing to a discussion of the Private Members' Bills in Section II, it may be apposite at this point to describe briefly some of the technicalities of Private Members' procedure. There are three separate procedures for initiating back-bench legislation - the Ballot, the Ten-Minute Rule, and Standing Order No. 37. These shall be dealt with in reverse order.

Under Standing Order No. 37 any Member can present an 'unballoted' Bill to the House on any sitting day by giving at least one day's notice. On presentation of the Bill a day for Second Reading is named and the Bill takes its place on that day's Order Paper. However, these Bills have no practical chance of being debated, since the Ballot Bills will have pre-empted the time. These Bills can make progress only 'on the nod', that is to say by being unopposed at all their stages, or in very rare and exceptional occasions by being allocated Government time.

The Ten-Minute Rule, or Standing Order No. 13, affords an opportunity for two Members each week to make a short ten-minute speech to introduce a Bill. A similar short speech can also be made in opposition. These speeches are made after Question Time on Tuesdays and Wednesdays. A vote may or may not take place. Unless defeated, the Bill then follows the same path as an unballoted Bill. The attraction to Members of this procedure is the publicity it affords. The opportunity is used to air a particular problem since it is rare for Ten-Minute Rule Bills to make further legislative progress.

The main method for introducing Private Members' Bills is the Ballot. On the second Thursday of each Session, 20 names are drawn from those Members who have entered the Ballot. These Members then introduce a Bill of their choice on the fifth Wednesday of the Session. The size of the Ballot and the number of Fridays available for their

consideration has varied. In the 1966-70 Parliament there were 27 Bills and 16 Fridays, but throughout the duration of the seventies there were only 20 and 10 respectively. With such severe pressure on time the number of Bills which have a realistic chance of success is obviously limited. Generally speaking the first 6 are guaranteed a Second Reading debate and the remainder have to jockey for position. Therefore a high position in the Ballot is essential if the Bill is to have a fighting chance. The later Fridays are then used to debate the remaining stages of Bills, priority being given to those Bills which have progressed furthest along the legislative road. Thus, time can be as big a hurdle to a Bill as any concerted opposition. The two are not unrelated, of course, for unless a Bill's sponsor can secure a Closure Motion which requires a minimum of 100 votes in favour, opponents can talk it out through a 'filibuster'. Lastly, Bills not reached during debating period are called over formally but can make no progress if any Member indicates opposition. This is usually done by saying 'Object'. Bills which have been objected to in this way, or talked out, can be put down for a later Friday, but needless to say, as time passes more and more Bills accumulate on the agenda.

In the following section it will be seen how some of these procedures operated in relation to the Scottish Divorce Bills.

II. The Scottish Bills

The first attempt to reform Scottish divorce law came on 27th January 1970 when Donald Dewar (Lab. Aberdeen South) introduced a Bill under the Ten-Minute Rule procedure, though conceding that the Bill was 'no more than a gesture'.¹ He admitted that its success would depend on the Government's willingness to give it parliamentary time,

but he was quick to point out that the English measure, which had not been in the first eight places in the Private Members' Ballot, had been helped from its Second Reading onwards by Government allocated time. Further, he argued that the legislative procedure for Scottish business could facilitate the passage of the Bill:

'This is a matter of Scottish concern only and it could pass through almost all its stages upstairs in Committee. The demands that it would make on this Chamber would be modest'.²

The important thing was, he suggested, that Scottish Members should have an opportunity to take a decision.

Opinion in the House was divided. Yet, no matter what the shade of opinion expressed, the speaker would invariably claim that he was reflecting public opinion in Scotland. It was to become one of the recurring features of all the debates throughout the six years before an enactment was achieved, that each contributor to the debate, whether he was in favour of reform or against it, would claim Scottish opinion to be on his side. In fact, Sir Myer Galpern (Lab. Glasgow Shettleston), who opposed the proposal, went as far as to say that there was widespread opposition to the reform in Scotland, even although his personal mail, which he described as being 'unusually heavy', indicated a majority in favour of change. His explanation for this conundrum ran thus:

'I confess that the majority were in favour of divorce law reform, but I am sure that every hon. Member knows that people living in adultery are much more vocal than others who are living in a harmonious state of matrimony'.³

It would seem that 'public opinion', like statistics, can be open to a variety of interpretations, and indeed distortions, in order that personal predilections may be justified.

Opinion in Scotland also appeared to be divided. Support for the

Bill's provisions came from legal opinion such as the Law Society of Scotland. However, reservations, which will be discussed more fully later, were expressed by the Church of Scotland's Women's Committee on Social and Moral Welfare:

'This is not a Bill that our Church is seeking to take up or support in any way. The Church's proposals are very different from those Mr. Dewar is seeking to propose. He wishes to add the ground of separation to the existing grounds. We would rather hold on to what is the present position than move into this kind of mixture. Mr. Dewar's proposal means that no matter what the position, a person could get a divorce - if they failed on the grounds of adultery they could then fall back on two years' separation. This is to cheapen marriage still further'.⁴

Before the division was called another old chestnut of an argument was produced as to why the reform should be opposed. It was Sir Myer Galpern again, and he failed to see why the House should be asked to agree to a proposal which would 'lead Scotland to hang on to the coat tails of England in this matter'.⁵ This was to be another central theme running through the debates - should Scotland seek parity with England on social issues of this kind thus making the law as near uniform as possible throughout Great Britain or should it seek to formulate social policy which was reflective of and particular to the Scottish context?

Dewar won his division by 115 votes to 84 and the Bill was read a First Time. A Second Reading was not achieved however, as it was deferred by objecting Members on four different Fridays between late March and early May.

Although the division was won by 115 votes to 84, a Scottish majority of 25 votes to 19 opposed the reform. In percentage terms this meant that 35.2% of the Scottish vote was opposed to reform and 26.7% was in favour, the remaining 38.1% comprising the 27 Scottish Members who did not vote. From Table 8.1 it can be seen that just

over half this opposition came from 13 Conservative votes which represented 61.9% of the 21 Scottish Conservative MPs sitting in the 1966-70 Parliament. 31.1%, or 14 Labour Party members voted in favour of the reform in contrast to the 22.2% or 10 Labour MPs who voted against. The Liberal Party were evenly split 2 for and 2 against and the solitary SNP Member, Mrs. Winnie Ewing, who had entered Parliament at the 1967 Hamilton By-Election, voted against this Scottish reform.

Table 8.2 shows voting by Age Groups and it can be clearly seen that the bulk of the opposition to reform came from the over 45s. 88% of those who voted 'No' fell into this category. On the other hand it can be seen that of the 10 Members who voted and were under 45, 70% or 7 MPs voted in favour. The picture which emerges from this table, then, suggests a fairly straightforward split between the younger Scottish MPs who tended to favour reform and the older Scottish Member who was more inclined to oppose it.

The difficulties of analysing the voting by religion have already been commented upon in Chapter 6. The breakdown of voting in Table 8.3 shows Scottish Catholic MPs to have voted against divorce reform by 3 to 1. In this 1970 vote a majority of the residual category of Protestants, Jews and atheists also came out in opposition to Donald Dewar's reform Bill.

Table 8.4 illustrating Scottish voting by Schooling shows the interesting pattern that English educated MPs voted more than 2 to 1 against the reform. Of the 13 MPs in this category, 9 voted against and of those 9, 7 were educated at an English public school. In contrast, those in receipt of a Scottish based secondary education, either at a local authority Academy or at an Independent, were generally disposed to vote in favour of reform (13 votes to 9). However,

when those who had received only an Elementary education are included, the Scottish based vote becomes much more equitably split, 14 votes to 12 in favour. It will be noted that these Elementary educated MPs voted 3 to 1 against the reform. These MPs are inevitably older Labour Members in their 60s and this conforms with the pattern established in Table 8.2 which suggested older MPs were anti-reform.

The breakdown of voting by Higher Education (Table 8.5) shows a remarkably even split for and against in each category, the odd vote or two in each case going against reform.

Table 8.6, illustrating voting by Region, indicates that Glasgow and 'the west' were just marginally against reform by 9 votes to 7, a pattern repeated in Edinburgh and 'the east', where 5 votes to 2 were cast against the measure. If one combines the Borders and South-West categories it can be seen that the vote in 'the South' as a whole was evenly split. This leaves only the North-East as the only region in favour of reform by 3 votes to 1.

Voting by Occupation (Table 8.7) shows the category of Miscellaneous White Collar to be the only one in favour. This category includes teachers, civil servants, local government administrators, trade union officials, journalists and others. Both the Professions, which included medics, lawyers and university academics, and Business, which included directors and self-employed farmers, came out against the proposed reform.

House of Commons Parliamentary Debate, Vol. 794, col. 1211.

Division on Divorce Law Reform, 1970.

The Division is on Donald Dewar's Divorce (Scotland) Bill, introduced under the Ten-Minute Rule procedure 27.1.70.

Figures in Tables include Tellers.

*Party composition at time of vote: Lab 45; Cons 21; Lib 4; SNP 1.

TABLE 8.1 Scottish voting by Party*

	Total vote	Scottish vote	Lab	Cons	Lib	SNP
Aye	115	19 (26.7%)	14 (31.1%)	3 (14.2%)	2 (50%)	0 (-)
No	84	25 (35.2%)	10 (22.2%)	13 (61.9%)	2 (50%)	1 (100%)

TABLE 8.2 Scottish voting by Age Groups

	Total vote	Scottish vote	Under 35	35-44	45-54	55-64	65+	Unknown
Aye	115	19	3	4	5	4	1	2
No	84	25	1	2	9	10	3	0

TABLE 8.3 Scotting voting by Religion

	Total vote	Scottish vote	Catholic	Others
Aye	115	19	1	18
No	84	25	3	22

TABLE 8.4 Scottish voting by Schooling

	Total vote	Scot. vote	Unknown	Scottish Elem.	Scottish Second. (Academy)	Scottish Indp.	English Grammar	English Public
Aye	115	19	1	1	9	4	1	3
No	84	25	4	3	7	2	2	7

TABLE 8.5 Scottish voting by Higher Education

	Total vote	Scot. vote	Oxbridge	Other English	Scottish Univ.	Other H.E.	None	Unknown
Aye	115	19	5	1	5	2	4	2
No	84	25	7	1	6	3	5	3

TABLE 8.6 Scottish voting by Region

	Total vote	Scot. vote	Borders	S.W.	Glasgow + 'west'	Edinburgh + 'east'	Central	N.E.	High-lands
Aye	115	19	2	2	7	2	2	3	1
No	84	25	0	4	9	5	4	1	2

TABLE 8.7 Scottish voting by Occupation

	Total vote	Scot. vote	Professions	Misc. White Collar	Business	Forces	Workers	Unknown
Aye	115	19	3	11	2	1	1	1
No	84	25	5	8	4	2	2	4

The second attempt at reform came early in 1971. Robert Hughes (Lab. Aberdeen South) had won third place in the Private Members' Ballot of the 1970-71 Session which guaranteed him a Second Reading debate at a Friday afternoon sitting. For the Bill to progress the debate had to be brought to a close with a closure motion, which required a minimum of 100 Members to vote for the motion, irrespective of the majority involved.⁶ Arithmetically, this Standing Order can have the effect of placing the Scottish Private Member introducing an exclusively Scottish Bill, at something of a disadvantage since Scottish representation in the House stands at only 71 Members.

The Bill was presented and read a First Time on 25th November 1970 and came up for its Second Reading debate on 22nd January 1971. Once again the speakers tried to establish what Scottish opinion was on the divorce issue - with claim and counter-claim being hurled around the debating chamber. Robert Hughes, the sponsor of the Bill, got the show under way by stating that 'there is no doubt that Scottish legal opinion is in favour of change',⁷ a sentiment backed up by Bruce Millan (Lab. Glasgow Craigton) who pointed to the support of the Scottish Law Commission.

However, while Scottish legal opinion may well have been in favour of reform, Sir Myer Galpern could not accept that there had been any demand for a change from the people of Scotland. He urged the House 'to reject outright this attempt to interfere with the existing Scottish divorce law because, first of all, there has been no demand for such an alteration, and secondly, there has been satisfaction expressed with the existing law'.⁸ Hamish Gray (Cons. Ross and Cromarty) also argued that the law had not been unduly criticised by the public in Scotland:

'This is obvious from the attendance in the Chamber today. The number of Scots Members of Parliament who have waited to participate today in this debate is surely evidence that there is no great demand in Scotland for this change. If Members of Parliament had received pressing demands from their constituents, that would be the most sure way of getting them into the Chamber for such a debate. The fact that so many Scots Members have not seen fit to wait and take part in this debate indicates that they have not been pressed by their constituents for a change in the law'.⁹

In sharp contrast, however, John Smith (Lab. Lanarkshire North) could not accept the validity of such a statement, responding that the average person never came into contact with divorce proceedings and was, therefore, unlikely to give it that much consideration. Supporting the proposed reform he argued that it was 'ridiculous for the law not to reflect social reality'.¹⁰ In similar vein, Ian MacArthur (Cons. Perth and E. Perthshire) suggested that divorce was not a subject on which people made spontaneous representations to MPs. Nevertheless, he sensed a change of opinion in Scotland:

'My assessment, for what it is worth - and it is certainly not based on any statistical system of measurement but is a matter of feeling rather than of logical judgement - is that there is now a large body of opinion in favour of reform, whereas there was not some years ago'.¹¹

What this debate serves to illustrate is that while it is relatively easy to discover the individual opinions of MPs, it is rather more difficult to unearth the evidence on which they base their assertions concerning Scottish public opinion. It becomes not only a question of what Scottish public opinion might be, but also who actually represents that opinion. On examination of the statements made in the debate it can be seen that each MP is basing his assertion of *what* the Scottish feeling is, on *who* is taken, or alternatively not taken, to represent public opinion in Scotland.

For instance, those supporting reform claimed the weight of legal and religious opinion to be on their side. Bruce Millan felt

the Scottish Law Commission's Report to be of particular importance for two main reasons:

'First of all, the confidence with which the arguments are marshalled ... and secondly, the fact that the people responsible for preparing it have considerable experience of how divorce law in Scotland works at present'.

Further, he held the views of the Church of Scotland in the same respect for similar reasons:

'not just because it can bring to bear a particular moral viewpoint, though that is obviously the most important consideration, but also because the ordinary parish minister in his parochial work has considerable experience of the consequences of broken or unhappy marriages'.¹²

One might say then, that this school of thought on Scottish public opinion tended to take well informed and articulate organisations as being representative of attitudes towards divorce law reform.

On the other side of the coin though, Sir Myer Galpern asserted that 'The Law Society which is anxious to have this change, because of the differences between the law in Scotland and the law in England, does not represent the Scottish people'.¹³ So who represented Scottish opinion for this school? For Hamish Gray it would seem to be, as noted earlier, that if MPs had 'received pressing demands from their constituents', then this would give a good indication of a desire for change. Here it would appear to be a form of ad hoc individual lobbying which gives an MP a true reflection of public opinion. Admirable as this may appear to advocates of participatory democracy, it does tend to undermine Sir Myer Galpern's position, that although the majority of his correspondents were in favour of reform, they were not to be regarded as a true reflection of public feeling, since by their nature they were bound to be more vociferous. The solution for Sir Myer was that the matter 'should be debated in the Scottish

Grand Committee, where only Scottish Members vote. In that way we could get a true reflection of Scottish opinion'.¹⁴

This suggestion raises a third point of view concerning public opinion. The statement 'in that way we could get a true reflection of Scottish opinion' tends to imply that MPs themselves *are* public opinion, or at the very least *arbiters* of public opinion. The implication is that public opinion is the individual MP's interpretation of a number of factors, such as constituency feeling, pressure group activity and media response, through which he is able to obtain a 'sense' of popular feeling.

Thus, it is possible to identify three different types of interpretation of public opinion:- i. public opinion as represented by organised group activity; ii. public opinion as represented by ad hoc individual lobbying; and iii. public opinion as MPs judge it. During the course of the debate on the Hughes Bill, John Smith commented that it was 'ridiculous for the law not to reflect social reality'.¹⁵ However, the question remained as to what that social reality was and how it was reflected. To this it will be necessary to return.

Meanwhile, when the vote was taken on the Second Reading of the Hughes Bill, the majority was 71 to 15 in favour and yet 'the question was not decided in the affirmative', because it fell short of the required 100 votes and as a consequence the Second Reading was deferred. For the following three Fridays the motion continued to be deferred and it was not until the 19th February that the Bill managed to be Read a Second Time unopposed, due to the fact that no objectors to the Bill were present. Rather strangely, although technically in order, the Bill was committed to an ordinary UK Standing Committee by the Speaker on the grounds that it was not legislation relating exclusively to Scotland. Apparently some of the financial provisions had

UK wide implications. The Committee managed to meet on three occasions, but with parliamentary time running out the Bill was lost as the session drew to a close.

Within this 71 to 15 majority in favour of reform, a Scottish majority of 23 votes to 13 also prevailed in favour. The new 1970-74 Parliament saw the Conservative Party assume power, but in Scotland party composition was only slightly changed with Labour having 44 seats, Conservatives 23, Liberals 3 and the SNP 1. However, only just over half those 71 MPs (50.7%) bothered to vote in the Divorce Division, the other 35 MPs (49.3%) being absent or abstaining. This meant that 32.4% of the Scottish vote was in favour of reform and 18.3% was opposed. From Table 8.8 it can be seen that 17 members of the Labour Party supported reform and this represented 38.6% of their parliamentary strength in Scotland. When compared with the 1970 Divorce vote this showed just under a 6% increase in support amongst Labour Members. Only 11 out of 23 Conservatives (47.8%) voted and because of this, Conservative opposition to the reform (6 MPs) stood at 26.1% of its Scottish Members, whereas a year previously in 1970 61.9% of Scots Tories had turned out to vote against. So even although the Scots majority was 23 to 13 in favour of reform, perhaps Hamish Gray had a telling point when he commented that the attendance in the Chamber was evidence that there was no great demand in Scotland for change.

Table 8.9 shows that the younger MPs under 45 continued to vote in favour of reform. Of the 14 votes cast in this category 10 (71.4%) were in favour. Interestingly the hard core opposition amongst the older (over 45) MPs that had been evident in the 1970 vote, was no longer as firmly entrenched. One reason for this might be that a number of 'traditional' Labour MPs in their 60s, with only Elementary

education, who had voted against in 1970, had retired to be replaced in the General Election by a new breed of younger, better educated Labour MPs. Another reason might be the low Conservative vote.

The pattern of voting revealed by Table 8.10 again shows Scottish Catholic MPs to have been opposed to divorce reform. On this vote, however, the residual category has swung round in favour of reform.

The breakdown of voting by Schooling (Table 8.11) shows the opposition from English educated MPs to have dropped dramatically, especially amongst those who attended an English public school. Again this fits with the pattern that one might expect from a low Conservative turnout, Labour MPs educated at English public school being few and far between. In the year since the previous vote, home educated Scots MPs appear to be more favourably disposed towards reform, on this occasion voting 16 to 8 for a change.

The most striking feature of Table 8.12, illustrating voting by Higher Education is the clear majority in favour amongst those educated at a Scottish university. 10 out of the 13 votes (or 77%) cast in this category wanted reform. The other categories remained as equivocal as the previous year.

Voting by Region (Table 8.13) shows that the Glasgow and 'west' vote remained numerically static at 9 votes to 7 against. However, there was a dramatic shift in the Edinburgh and 'east' vote from 1970 when it had voted 5 to 2 against. In 1971 this vote was 6 to nil in favour. This swing can be partly explained by the fact that two Conservatives, Anthony Stodart (Edinburgh West) and N. R. Wyle (Edinburgh Pentlands), who had voted "No" in 1970 walked through "Aye" lobby in the 1971 Division. Also George Willis (Lab. Edinburgh East), who voted against in 1970, was replaced by Gavin Strang (Lab. Edinburgh East) in the 1971 Election and the new incumbent

House of Commons Parliamentary Debate, Vol. 809, col. 1550

Division on Divorce Law Reform 1971.

The Division is on Robert Hughes' Divorce (Scotland) Bill introduced under the Ballot, 22.1.71.

Figures in Tables include Tellers.

*Party composition at time of vote: Lab 44; Cons; 23; Lib 3; SNP 1.

TABLE 8.8 Scottish voting by Party*

	Total vote	Scottish vote	Lab.	Cons.	Lib.	SNP
Aye	73	23 (32.4%)	17 (38.6%)	5 (21.7%)	1 (33%)	0 (-)
No	17	13 (18.3%)	7 (15.9%)	6 (26.1%)	0 (-)	0 (-)

TABLE 8.9 Scottish voting by Age Groups

	Total vote	Scottish vote	Under 35	35-44	45-54	55-64	65+	Age Unknown
Aye	73	23	3	7	11	1	0	1
No	17	13	1	3	6	2	1	0

TABLE 8.10 Scottish voting by Religion

	Total vote	Scottish vote	Catholic	Others
Aye	73	23	0	23
No	17	13	2	11

TABLE 8.11

Scottish voting by Schooling

	Total vote	Scot. vote	Unknown	Scot. Elem.	Scot. Second.	Scot. Indp.	English Grammar	English Public
Aye	73	23	3	1	11	4	1	3
No	17	13	3	1	6	1	0	2

TABLE 8.12

Scottish voting by Higher Education

	Total vote	Scot. vote	Oxbridge	Other English	Scottish univ.	Other H.E.	None	Unknown
Aye	73	23	4	1	10	1	5	2
No	17	13	3	0	3	1	5	1

TABLE 8.13

Scotting voting by Region

	Total vote	Scot. vote	Borders	S.W.	Glasgow + 'west'	Edinburgh + 'east'	Central	N.E.	High- lands
Aye	73	23	1	3	7	6	2	3	1
No	17	13	0	1	9	0	1	1	1

TABLE 8.14

Scottish voting by Occupation

	Total vote	Scot. vote	Profes- sions	Misc. White Collar	Business	Forces	Workers	Unknown
Aye	73	23	4	13	2	0	1	3
No	17	13	0	6	3	2	1	1

cast his vote in favour. Moreover, MPs who had previously opposed such as Michael Clark Hutchison (Cons. Edinburgh South) and Tom Oswald (Lab. Edinburgh Central) were absent, while supporters such as Ronald King Murray (Lab. Edinburgh Leith) were present.

Table 8.14 (voting by Occupation) shows the majority in favour amongst the category of Miscellaneous White Collar to have increased from 11 votes to 8 in 1970 to 13 to 6 in 1971. The clear majority of 4 to nil in favour (as opposed to 5 to 3 against in 1970) which prevailed amongst the Professions can again be explained by the absence of Conservative Members, several of whom fall within this category.

The third and fourth attempts at reform were instigated under the Ten-Minute Rule procedure by Willie Hamilton (Lab. Fife Central) on the 23rd January, 1973, and the 14th May 1974, respectively. Again the case was pleaded that the basic principles of the Bill were approved by the legal organisation, the Church and other 'non political bodies as well as countless individuals',¹⁶ and once more pleas were made to the Government to allocate sufficient parliamentary time to allow the legislation to proceed. On both occasions the Bill was introduced after a First Reading, only to have Second Reading deferred several times by the objections of Hon. Members, the principal antagonist being T. G. D. Galbraith.

The fifth attempt was made by Robin Cook (Lab. Edinburgh Central) again under the Ten-Minute Rule Procedure, on the 21st January 1975. It is interesting to note the regularity with which the reform Bills appeared, virtually once a year. Such consistency in itself would tend to suggest some sort of desire for change. Once more the claim was presented that 'nearly everybody of informed opinion in Scotland accepts the case for reform'. Cook harangued, 'Why then, do we still

fail to reform the Scottish law on divorce five years after the reform of the English law and ten years after the report of the Scottish Law Commission urging reform in very strong terms? Heaven knows, it is not for the want of trying'.¹⁷

Yet without the assistance of Government time, which never looked like being made available, the Bill was destined to flounder. On no fewer than ten occasions between mid-February and mid-May the Bill failed to clear the hurdle of Second Reading, being objected to each time by Tam Galbraith (Cons. Glasgow Hillhead). Cook described these Friday sittings as an 'elegant little ritual', and was later to remark:

'Although the veto procedure is sound in principle since it prevents a contentious Bill making progress without a debate on its merits, in this case there was widespread reaction to its use by a member who had been divorced in an English court under the reformed law which he was now seeking to deny Scotland. In retrospect it is clear that Tam Galbraith did more than anyone else to marshal public opinion in favour of divorce law reform'.¹⁸

III. Public Opinion: Pressure Groups

The position of the Church of Scotland on the divorce issue in the first half of the seventies requires some clarification. It will be recalled that the Church issued a statement early in 1970 disassociating itself from Donald Dewar's Bill on the grounds that the Church's proposals were fundamentally different from the provisions of that Bill which sought to add the grounds of separation to the existing grounds. That remained in essence the Church's position throughout the protracted struggle for reform despite the fact that numerous supporters of reform repeatedly, and somewhat mistakenly, claimed the wholehearted support of the Church for their cause. It was not that the Church was opposed to reform - far from it. The Kirk, in fact, did not consider the proposed reform radical enough

in that it did not rid itself completely of the old accusatorial clauses. While agreed on the principle that the breakdown of marriage should be the sole ground for divorce the Church of Scotland was far from impressed with the compromise solution reached by lawyers whereby the old matrimonial offences were retained as one means of proving that breakdown had occurred.

In a Moral Welfare Committee memorandum of 1972, the Church argued 'that the need for reform of the divorce law in Scotland is now even more urgent than it was in 1969'.¹⁹ Two main reasons were submitted for this. Firstly, in theory at least, there was a wide divergence between the law of England and the law of Scotland as regards divorce which was undesirable both on grounds of public policy and in terms of human suffering. Secondly, Scottish courts often had to witness matrimonial disputes which involved deceit, bitterness and gross exaggeration. Yet, despite this desire for reform, the memo commented on the Hughes Bill that 'this did not in fact seek to reform the law in the way envisaged by the Committee', and it continued in a rather relieved tone 'in any event the Bill was not granted sufficient parliamentary time and therefore never completed its passage through parliament'.²⁰

Late in 1973 a meeting was arranged between representatives of the Moral Welfare Committee and representatives of the Scottish Law Commission in an attempt to iron out some of the differences between the two sides. While the meeting was conducted in a very cordial atmosphere and there was broad agreement on the main objectives, there was, nevertheless, disagreement on the details of the reform, as the Church 'was still not sure about accusatorial factors'.²¹

In early 1974, advice was tendered by Lord Dunpark as to how the Church should proceed. Lord Dunpark, formerly Alister Johnston QC,

was a member of the Moral Welfare Committee's Working Party on divorce law reform in the sixties and worked on the Scottish Law Commission in the early seventies, being responsible for the drafts of the Dewar and Hughes Bills. His personal views, favouring the substitution of the principle of breakdown, based on a period of continuous separation, for the doctrine of matrimonial offence, were expressed as early as 1968 in the Law Society Journal.²² While his sympathies lay with the Church's point of view, experience had made him familiar with both sides of the argument. He wrote to the Convener of the Moral Welfare Committee in February 1974 indicating that there were two reasons why the Church's views had failed to find acceptance in Scottish legal circles. Firstly, there was the desire of Scottish reformers to harmonise as far as possible the divorce laws of England and Scotland. Secondly, there was the impossibility of persuading Parliament that the public would be prepared to accept divorce laws which abolished divorce for 'bad conduct'.

In his letter he stated:

'Let us be clear that there is now *no hope at all* of persuading Parliament to legislate on the lines desired by the Church of Scotland in 1969, in the immediate future. No Government nor Member of Parliament would, I am sure, be willing to sponsor a Bill which would lose them or him the votes of those who agree with the view ... that it is an unnecessary hardship to cause a spouse who cannot forgive an act of this nature (i.e. adultery, sodomy or bestiality) to wait for two years before raising an action.

'If your Committee's priority is to obtain divorce law reform in the immediate future, then it must accept the Sub-Committee Report and the form of the latest Bill, because that is the form recommended by the S.L.C. which the Government will accept.

'My personal opinion is that, if the Church of Scotland were now to abandon its enlightened 1969 attitude on the grounds of practical expediency it would lay itself open to criticism. My advice to the Church would be to leave well alone and remain silent'.²³ (original emphasis).

Dunpark, then, advocated silence 'rather than execute a complete volte face', which is by and large the attitude the Church adopted.

In March 1974 the Scottish Law Commission issued a memorandum outlining the areas of agreement and disagreement between the Church's proposals and those of the Commission. In the opinion of the S.L.C. it was of the 'utmost importance that those who support divorce reform should, in the public interest, attempt to reach an agreement or, at any rate, a measure of agreement'.²⁴ Common ground between the two sets of proposals lay in the acceptance of irretrievable breakdown of marriage. Divergence lay in the fact that the Church wished to see all vestiges of the matrimonial offence removed whereas the Commission favoured the retention of the former offences as proof that the marriage had irretrievably broken down. The Church's proposals were subjected to a number of critical comments by the S.L.C. Firstly, it was pointed out that since the main opposition to reform centred on the reluctance of MPs and the public to allow divorce of a blameless spouse after two years separation, there would be even more violent opposition if divorce was to be granted after two years separation without consent. The Commission were of the opinion that there was a real difference between the case where neither party objects to the divorce and the case where one party does object. Further, the Commission considered it an exaggeration to say that adultery and cruelty afforded instant grounds of divorce. It had to be remembered that divorce was a relatively slow process even where the action was undefended, but more importantly divorce was a step which few spouses took lightly. In this vein the Church's thinking on judicial separation would have unforeseen consequences. The Church's idea was that alongside the new structure for divorce a sub-structure for separation should continue. However, since judicial separation was available only

on proof of a matrimonial offence or of conduct justifying non-adherence, the practical effect would not be what the Church intended in that in many cases of adultery or cruelty there would be two sets of proceedings where previously there had been only one.

On the basis of these criticisms the Scottish Law Commission concluded:

'This Commission believes that its proposals taken as a whole are fair, just and compassionate and therefore in principle worthy of support by the Church. The Commission also sincerely believes that its solutions are likely to win a larger measure of support from public opinion and Members of Parliament and are therefore more realistic politically than the solutions adopted by the Church. The Commission therefore would ask for the Church's support for its proposals as going at least some of the way towards the common objectives of divorce reform, while appreciating that the Church must lead, and not merely reflect, public opinion and might therefore reserve its position as to the ultimate shape which the law of divorce in Scotland should take'.²⁵

Signs that the Church's attitudes were beginning to soften appeared in 1975 when the General Assembly reported:

'Divorce Law Reform continues to be a matter of Parliamentary concern and is being reassessed by the Committee. It believes that there are lessons to be learned from the English experience of their reformed divorce laws. ... The Committee remains convinced that reform is necessary, but is not fully in accord with such proposals as have so far been brought forward.'²⁶

By the end of that year however, the Church accepted the inevitability of the S.L.C. proposals. With the MacCormick Bill before Parliament the Church relented and acknowledged that there were grounds for the retention of the modified traditional grounds, especially in cases of unreasonable behaviour where a remedy at the earliest opportunity was necessary for the protection of one or other spouse. The Church stated:

'We fully appreciate that this recommendation is contrary to the views of the General Assembly of 1969. Nonetheless, we consider that the criticisms

made of the Assembly's views by the Law Commission in its Memorandum of March 1974 are valid and that there are positive advantages from the proposed retention of the modified traditional grounds as exemplifying circumstances of irretrievable breakdown'.²⁷

The Church of Scotland's position can be summarised thus: while it was pro-reform in its outlook it did not undertake any lobbying activity, because although agreed on the principle of divorce law reform, the details of the Bills were at variance with its own recommendations. It was not until very late in 1975 that the Church came round to accepting that the retention of the traditional grounds in modified form was justified. Therefore, throughout the struggle for reform the stance of the Church is best described as passive in so far as it failed to mount any active campaign to promote reform, or to exert any parliamentary pressure to have the series of Bills enacted.

As far as the Scottish Law Commission is concerned, it was much more active, being responsible for the legislative drafts of the divorce reform Bills. However, being part of the government machine it cannot really be described as a pressure group in the traditional sense. Nevertheless, its importance should be acknowledged in that it was responsible for assisting the sponsors of the Bills, and also for bringing about the change in Church thinking. Its contribution is best viewed as an example of how pressures for change can come from within the machinery of government itself, a point already noted by Hall et al.²⁸

The Roman Catholic Church in Scotland was, of course, strongly against any reform in the divorce laws since in their teaching marriage is both a civil act and a sacrament. Hence, divorce is viewed by the Catholic Church as a threat to the stability and sanctity of

marriage, and thus as a social evil. It was on these grounds then, that it opposed the Scottish reform attempts in the first half of the seventies.

Speaking in opposition to Willie Hamilton's 1973 reform Bill, a Catholic spokesman commented:

'This Bill would go even further towards making marriage a casual institution in this country. The Catholic Church upholds the sanctity of the marriage vows, and believes any further attack on them can only weaken an institution which is vital to the happiness of our society'.²⁹

Two years later in March 1975, when Robin Cook's Bill was trying to make progress, the Catholic Press Office again made their position clear:

'The question of divorce is not even under review in the Catholic Church - there is no big movement to have the teaching changed. Everyone accepts that the sacrament of marriage between two Catholics is inviolable, and if two Catholics break up, neither can re-marry. No one says it isn't tough'.³⁰

The underlying theme of the Roman Catholic Church's opposition, then, was their belief that divorce undermined the sanctity of marriage. Any reform which set about to relax the divorce laws was consequently perceived as reducing marriage to a casual institution. Accordingly the Catholic Church in Scotland urged its members to lobby their MPs to oppose any change.

One of the main difficulties with an issue like divorce is that it is a topic on which few people are likely to be vocal. However, there is a line of thought which suggests that actual vocal representation need not always be the foremost consideration when contemplating reform. In 1972 Willie Hamilton remarked that 'the fact that there is no vocal evidence that the bulk of people in Scotland want this Bill is no reason why this House should not legislate. Very often we legislate because we think it is right to do so, and in that respect

we have to lead public opinion rather than be a reflection of it.'³¹
 For such an approach to be successful though, implies that public opinion, while not vocal, would need to be sufficiently sympathetic (or indifferent) to the reform.

This absence of organised lobbying has been noted by Robin Cook:

'...reforms of English personal law were greatly facilitated by the intensive lobbying of Parliament by organisations such as the Divorce Law Reform Union, or the Sexual Law Reform Society, but the Scottish debates of the past couple of years have been marked by the absence of any such group or any form of organised lobbying'.³²

In sum, then, while certain influential sectors of Scottish opinion were in favour of divorce law reform, there was little, if any, active organised support for the successive reform Bills.

IV. Public Opinion: MPs' Appraisal

Before proceeding to the issue of what MPs thought public opinion in Scotland to be on the matter, it is important to understand just how MPs assess public opinion. When interviewed the most common indicator which MPs acknowledged to be influential was the correspondence they received. They pointed out though, that while mailbags could be useful, they only reflected the opinion of those who could be bothered to write. So the opinion of the limited number of people who wrote had to be balanced with wider feeling within the rest of the constituency.

Neil Carmichael (Lab. Glasgow Kelvingrove) for instance, indicated that anything over 50 letters on an issue was a lot of correspondence. Most MPs he said, took into account the 'quality' of a letter as manifested in its presentation and argument, although not to the exclusion of everything else. MPs were painfully aware that the ill-educated constituent was just as capable as the educated one of

withholding his vote at the next election. In his experience there were two basic types of argument - argument which arose from emotion and feeling, and argument which arose from an intellectual appraisal of the situation. Each in its own way could have an effect on him. He pointed out that each MP's constituency varied in terms of social and economic structure, and this too could have a bearing on the type of issue constituents would lobby on. He described the composition of his own, Glasgow Kelvingrove, as being 'rather elitist' with the result that his constituents were 'very good at articulating demands on all sorts of issues from the environment to the Third World'.³³ Therefore, it was important not only that he knew his position on issues of this sort, but that he could explain why he had adopted it. This brought an element of personal conviction into the assessment. It was of the utmost importance that an MP made a decision on grounds that could be sustained. He remarked, 'The MP's own view of the situation is important and whatever decision or point of view taken, the important factor is to be able to defend and sustain that position'.³¹

This sentiment was repeated by Iain Sproat (Cons. Aberdeen South). He explained that personal conviction played a part in some way in most decisions an MP had to take, but it was especially important on moral issues when free votes were in operation. He commented:

'As an MP the public assesses your character. Some people in politics are felt to be trustworthy and to speak with conviction while others are not. People might not necessarily agree with the sentiment being expressed but they would know it was based on conviction'.³⁴

In this manner the character of an MP could be an important factor in the outcome of decisions. He held up Lord Boothby and Willie Ross as examples who were in this mould.

Public meetings and surgeries could also play a part in shaping an MP's opinions, although varying degrees of importance were attached to them. Dennis Canavan (Lab. West Stirlingshire) for example, found public meetings a useful means of assessing public opinion as he was able to obtain some measure of feeling through the questions and responses. In a similar fashion, Iain Sproat thought that on 'neutral occasions', such as coffee mornings, he could mix freely with people and hear their opinions on different issues. However, this factor was not so important for Neil Carmichael. He indicated that he tended to mix with 'political people' most of the time so it was difficult to see and appraise what 'ordinary people' were thinking. It was a situation he regretted, but moving within political circles rarely gave him the chance 'to meet the people in the pubs and clubs'. He also had his reservations about the usefulness of surgeries as indicators of popular feeling, since very often those attending were seeking advice and assistance with their problems, rather than offering opinions.

Pressure groups were also an influence. Robert Hughes thought that organised and informed opinion could be influential especially in situations where the MP was undecided. Iain Sproat, however, was cautious about the role of pressure groups. He responded:

'Pressure groups can be important. It depends on an MP's experience and character of how important he lets them be. Pressure groups can have particular interests and vested interests, of whatever kind, can be dangerous to democracy'.³⁵

There was a need to balance particular points of view because an MP could do an injustice to society as a whole by focusing on a particular interest to the exclusion of all others, he thought.

A rather delicate and sensitive source of influence was that of religion. This was an influence which MPs agreed was extremely

difficult to assess. Robert Hughes for instance, revealed that 'the Catholic Church can have a considerable effect on some MPs'.³⁶

No doubt a similar statement could be made about the Church of Scotland. The difficulty of assessing the depth of religious conviction was captured by Neil Carmichael when he remarked, 'religion is important in shaping opinion but it is impossible to quantify since it is not even dependent on being religiously active'.³⁷

Another indicator affecting an MP's judgement which was thought difficult to quantify was the media. However, it is an important general factor in an MP's appraisal of public opinion. The media could have quite a dramatic effect at particular moments. Iain Sproat said that he could be 'sparked off by certain ideas, but it depended on the time, place, mood etc.'. He added, 'The press can make things seem more important. It can focus attention on specific matters to the detriment of others'.³⁸ Neil Carmichael concurred that the media could be influential and he personally found 'The Sunday Mail' a useful indicator of popular feeling. The media, he thought, could throw up the occasional surprise in that sometimes there would be a big response to an issue which previously had not been considered that important. Likewise, issues which might be expected to cause a stir could sometimes go largely ignored.

All of these factors, and no doubt some others, play an important part in an MP's appraisal of public opinion. Sometimes pulling in different directions, sometimes working in conjunction, these factors tend to prey upon an MP's consciousness (and conscience) so that 'assessment becomes a kind of filtering operation'.³⁹ The assessment is, then, a matter of individual judgement and as MPs are by their very nature political animals, an element of 'selectivity' inevitably creeps in. As Barker and Rush have pointed out, an MP needs information

only partly for its own intrinsic sake and, beyond that, judges it in the practical, political terms of what good it does him and his political position to take the trouble to absorb it. They have argued that:

'Politicians are advocates of public issues and use "information" of various kinds to support their opinions. This means that they are selective in their information up to and beyond the point where they will ignore or suppress information which may undermine the force of their case or the information on which they feel it is based'.⁴⁰

In other words, MPs, like the rest of us, will tend to play up factors which reinforce their personal biases, while playing down those which are not in accord with their way of thinking.

What then, did MPs feel public opinion to be on the issue? Personal judgement of public opinion tended to vary from MP to MP, but there were certain broad areas of agreement. A number of MPs, for instance, felt quite simply that there was no demand for reform in the earlier part of the seventies. Harry Ewing (Lab. Stirling, Falkirk and Grangemouth), said that as far as he was aware 'there was no public opinion clamouring for reform'.⁴¹ He felt that the continued failure of Private Members' legislation throughout the early seventies was an indication that opinion was against them. By the mid-seventies though, he thought that 'a constructive desire for change had emerged'.⁴² The feeling of some MPs was that Scottish opinion tended to be more conservative with a small 'c', on such social issues. Malcolm Rifkind (Cons. Edinburgh Pentlands) considered Scottish public opinion to be more 'traditional' and this was reflected on MPs' early opposition to divorce reform. There were a number of reasons for this, he indicated, the two principal ones being the greater proportion of working class opinion in Scotland which manifested this 'traditional' quality and the underlying

influence of religion in opinion formation.

Donald Dewar endorsed this view that different cultural traditions existed north of the border. He pointed to the higher percentage of church membership in Scotland and emphasised the heavy Roman Catholic view concentrated in the West. Since a great deal of support for the Labour Party came from Catholics, Labour MPs in the early 70s were not inclined to persuade people that reform was necessary. Leo Abse (Lab. Pontypool) also attached importance to the 'primness in the Scottish attitude' which he attributed to the Calvinist ethos underpinning Scottish morality.⁴³ He indicated that when he had sounded out the opinion of Scottish MPs during the passage of the English Bill in the sixties, they had been reluctant to support reform. To have included Scotland in that provision would have jeopardised the whole Bill since the Scots MPs would have most certainly obstructed its passage.

Iain Sproat suspected that there may have been ambivalence in Scotland on the issue in as much as the Scots may have liked the idea of greater freedom, but deep within themselves felt opposed to the break-up of the family. He suggested that opinion in Scotland may have lagged a little behind in the sense that 'Scotland does not have London which generates a metropolitan ethos'.⁴⁴ Consequently, pressure for reform was slower to build up.

Robin Cook's analysis was that while an element of personal conviction was bound to be involved in an MP's appraisal, MPs did feel that they were reflecting public opinion. He revealed, 'A number of MPs felt inhibited to support reform because of what they felt public opinion to be. MPs felt they were in harmony with public opinion since they considered public opinion to be hostile to reform'.⁴⁵

Underlying this issue is the theoretical relationship between an MP and his constituents. The classical statement on this relationship, widely quoted, came from the 18th century statesman Edmund Burke:

'Their wishes ought to have great weight with him; their opinion, high respect; their business, unremitted attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions, to theirs; above all, ever, and in all cases to prefer their interest to his own. But his unbiased opinion, his mature judgement, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living ... Your representative owes you not his industry only, but his judgement; and he betrays, instead of serving you, if he sacrifices it to your opinion'.⁴⁶

In this scenario then, an MP's judgement ultimately prevails, but not before he has given constituency opinion 'high respect'.

This too, has been noted by Peter Richards, who has found:

'... when the Whips allow a free vote the spirit of Burke is resurrected and Members become jealous of their independence. As free votes are limited to questions on which party alignments are inapplicable, no one can be accused of lack of party loyalty. Even so, Members do not care to offend what they know to be a majority view in their constituencies...'.⁴⁷

In the early seventies then, it would appear that Scots Members did not support reform in sufficient numbers because they believed public opinion was not entirely sympathetic to change.

V. Public Opinion: The Media

Press coverage of the Scottish divorce issue in the early seventies tended to highlight the differences which prevailed in the law north and south of the border. On the day Willie Hamilton was set to introduce his Ten-Minute Rule Bill, 23rd January 1973, the 'Daily Record' reported that 'Scotland's divorce laws were once way ahead of England and Wales ... but our laws have been lagging behind now

for two years'.⁴⁸ The report went on to draw attention to the anomalies which had arisen and to the need for parliamentary time to be given to debate the issue.

A few days earlier, the 'Glasgow Herald' ran an in-depth feature under the headline 'More Scottish divorce but no reform of the law'.⁴⁹ It recorded that since the English system had been reformed it was widely felt in Scottish legal circles that it would only be a matter of time before a similar reformation took place in Scotland. The 'Herald' commented on this state of affairs, 'The delay is a matter of concern ... The subject at least demands full discussion by our parliamentary representatives'.⁵⁰ It proceeded to explain to its readers that the Bill would be introduced by Willie Hamilton under the Ten-Minute Rule procedure, but since the Government of the day under Mr. Heath had refused to give it special treatment in the way of extra time, it would have little chance of success. The feature then suggested that the Bill would have stood a much better chance if it had been selected by Willie Hamilton when he won his place in the 1972-73 Ballot. The 'Herald' explained:

'Instead, Mr. Hamilton opted for women's rights. Other Scottish MPs who were also high up the list by-passed the divorce reform because the Scottish anti-reform lobby in Parliament is still strong enough to make the progress of any reform Bill extremely difficult'.⁵¹

In response to this piece Professor I. D. Willock of the Faculty of Law, University of Dundee, wrote to the 'Glasgow Herald' suggesting that the resistance to divorce reform in Scotland stemmed from reluctance to allow separation for five years as a ground without the consent of the spouse defending.⁵² He advocated that there was no reason why other desirable reforms should be held up until public agreement was obtained on this issue.

A 'Glasgow Herald' leader echoed this sentiment in March 1973. It commented that 'apart from the untidiness of being out of step with England on this question, it is certainly time that in Scotland the matrimonial offence was finally buried and that the irretrievable breakdown of marriage was substituted as the sole ground for divorce'.⁵³

A year later in May 1974, when Willie Hamilton was introducing his second reform Bill, Professor Willock commented in another letter that Scotland could very easily have a simpler divorce law based on the desire of one or both spouses for divorce and conditional upon their living apart for a certain period. He pleaded:

'Could our two major religious denominations not agree that in an increasingly secular society, such a settlement though perhaps short of their ideals, is worth campaigning for?'.⁵⁴

When Robin Cook introduced his reform attempt in January 1975, the 'Daily Express' ran the headline 'MPs cheer as new Bill is given go ahead' and added in the first paragraph that 'there will be fury among MPs if it fails'.⁵⁵ Emphasizing the number of attempts, the 'Glasgow Herald' announced 'Fifth Bill for divorce reform' but warned that because the Bill had been introduced under the Ten-Minute Rule procedure its future was 'problematical'.⁵⁶ Two months later the 'Herald' informed its readership that discussions were taking place between the Bill's sponsor, Mr. Robin Cook, and Government Ministers over the question of parliamentary time, but that Mr. Harry Ewing, Under Secretary of State at the Scottish Office, remained non-committal. It was at this time that T. G. D. Galbraith repeatedly objected to Robin Cook's Bill receiving a formal Second Reading and he sought to explain himself in the letters page of the 'Glasgow Herald'. He wrote that 'there is nothing unusual in the treatment of Mr. Cook's Bill (though that seems to be the impression); and that most Bills of

substance, whose sponsors have not secured a high enough place to ensure debate, get "blocked" each Friday'.⁵⁷ As the sequence of objections continued the 'Aberdeen Press and Journal' noted that the 'Scottish Divorce Bill fails again'.⁵⁸ In April the 'Daily Mail' reported that 'MP ends fight for divorce reform',⁵⁹ while in May 'The Scotsman' announced that Robin Cook had formally withdrawn the Bill 'after it became clear that the Government would not intervene to provide time for the measure'.⁶⁰

The summer months of 1975 witnessed increased pressure for divorce reform. There were talks between the Law Society and the Scottish Office and aggrieved MPs began to speak out even more vociferously, ridiculing the Government's priorities which had found time for a debate on hare coursing but not for Scottish divorce. In June the Earl of Selkirk introduced a Divorce Reform Bill in the House of Lords and won an unopposed Second Reading. 'The Sunday Times' reported of a 'New attempt to reform divorce, Scottish style' and indicated that there were 'signs of a breakthrough for the reformers'.⁶¹ But when the Bill reached the Commons in July, the 'Scottish Daily News' reported Edward Short, Leader of the House, as saying, 'I regret that this very important and very necessary Bill has very little chance of reaching the statute book this session'.⁶²

In the new 1975-76 Parliamentary Session the divorce issue once more came onto the agenda. In late December 'The Scotsman' disclosed that there were 'Duplicate divorce Bills "for safety"'. The Earl of Selkirk was again proposing to take his divorce reform Bill through all its stages in the Lords 'as a precaution against procedural blockage of the identical Commons Bill sponsored by Mr. Iain McCormick'.⁶³ But by February 1976 the 'Daily Express' was able to report confidently, albeit with split infinitive, that 'Iain McCormick is expected

to finally succeed in reforming Scottish divorce laws'.⁶⁴ Then in March a relieved 'Record' announced that the 'Divorce Bill clears hurdle'. Its opening paragraph informed its readership that Tory MP Tam Galbraith 'whose own divorce went through under English law last year failed in the Commons ... to hamstring the new Scottish Divorce Bill'.⁶⁵ Finally, with the passing of the provision, the 'Evening Times' was moved to comment that the new Divorce (Scotland) Act would come as a 'God-send to people who have been caught for years in the agony of unhappy wedlock'.⁶⁶

A good cross section of the Scottish press would appear to have been favourably disposed towards divorce reform. As the seventies progressed the Scottish press became increasingly irritated that divorce law north of the border remained unchanged. The press was thus influential in helping to create a climate of opinion which was conducive to reform.

VI. The 1976 Divorce Reform.

The Divorce (Scotland) No. 2 Bill was presented and read a First Time on 17th December 1975. It was the 'No. 2 Bill' because the Earl of Selkirk had introduced the same Bill in the Lords on the 25th November. The Bill was being sponsored by Iain MacCormick (SNP, Argyll) who had won 4th place in the Private Members Ballot. In one very important respect it was a remarkably courageous decision for him to introduce the Bill for he was a Roman Catholic with definite religious beliefs about this issue. He commented in his introductory speech:

'...it quickly became apparent to me, especially since I was the only Scottish Member to be lucky in the Ballot that I did not have much alternative. I had to seek to introduce a measure that was genuinely necessary and important and that would affect the whole of Scottish society'.⁶⁷

He pointed out that the law had been reformed in many European and Commonwealth countries as well as in England and Wales, so it was of the utmost importance that Scotland caught up.

The aim of the Bill was to make provision for those whose marriage had broken down and were no longer married in any meaningful sense. The provisions of the Bill bore a striking similarity to those of the English measure. The main change, and point of contention, lay in subsections (1) and (2) of Clause 1. Subsection (1) provided that the sole ground on which divorce could be granted in future would be that the marriage had broken down irretrievably. Subsection (2) set out the five conditions from which irretrievable breakdown was to be inferred. Three corresponded to the old matrimonial offences of adultery, cruelty and desertion and there were two new conditions which provided that breakdown was to be inferred by a period of two years' separation if both spouses consented to the divorce, and a period of five years' separation if one spouse unilaterally sought divorce. The Bill also contained provisions relating to reconciliation and to aliment which were similar to their English counterparts.

MacCormick emphasised on Second Reading, however, that the Bill was not to be viewed as simply a carbon copy of the English enactment, to make Scots law the same as English law on the issue. Sensitive to the criticisms which had been levelled against him on this score, he stressed:

'Whatever the opponents of this measure may think, it does not represent a retreat from an unyielding and fundamentalist Scottish attitude on the subject. On the contrary it allows Scots law to recover what it has recently lost - namely, leadership in a sensible civilised approach to divorce'.⁶⁸

This though, was not good enough for Tam Galbraith who launched into a scathing attack on both MacCormick and the Bill. MacCormick

was criticised for having 'wasted a great opportunity', while the Bill was no more than a 'sham'. His fears were that the Bill would 'remove the structure of contract as the support of marriage', that divorce would be made easier and that a 'spiritual vacuum' would be created. Further, he vigourously defended his previous stance on the divorce issue and slated Robin Cook for the 'attempted character assassination' and 'arm-twisting' after his vetoes on earlier reform attempts. He commented:

'We are present in this House not to question each other's motives or to seek to denigrate perfectly respectable arguments on purely personal grounds. If we are to do our job properly, we must examine carefully and critically, as well as sympathetically, in accordance with our own view of what public interest requires, whatever proposals are put before us'.⁶⁹

The reference to the 'attempted character assassination' was to the disclosure that Galbraith himself had been divorced under the English reform while at the same time blocking progress on the Scottish measure. For the present, of most interest in this statement was the reference to 'our own view of what public interest requires' which illustrates the manner in which MPs can place primary importance upon their own judgement of public good.

Galbraith's solution to the shortcomings of the Bill was a rather complicated system which revolved around a concept described as a 'family centre'. A provisional outline of this system suggested that the 'family centre' would operate as a kind of clinic for broken marriages and associated family problems. Upon initial deterioration of the marriage, spouses would come along to the centre and register their desire for divorce, whereupon the staff would move into action in an attempt to affect a reconciliation. The idea was that even if the marriage was not saved, the social services would at least assist

each spouse to come to terms with divorce. Both in the principle upon which divorce should be granted, and the emphasis placed upon the need to attempt and facilitate reconciliation, the idea was not that far removed from Church of Scotland thinking on the issue. However, the scheme was fraught with practical difficulties which effectively buried it in Committee.

Underlying Galbraith's thinking was the concern that Scotland was imitating an 'imperfect Act of the English'. He argued:

'If there is to be any justification for a separate legal system we should look at each problem with fresh eyes and not simply follow what is done in England'.⁷⁰

Galbraith's case then, was based on the principle that policy should be formulated to meet particular Scottish requirements.

The opposing view, that is the case for uniformity in policy areas of this nature, was put by both Robin Cook and Malcolm Rifkind. Robin Cook felt that there was now strong public feeling in favour of reform and one of the prime reasons for that feeling was 'the general sentiment that the law as it affects individuals within a united country, should be broadly comparable and similar'.⁷¹ In a similar vein Malcolm Rifkind pointed to the irony of an SNP member introducing a Bill of this kind, 'because it emphasises that in the sphere of personal laws, as in so many others, it is undesirable and unnecessary that we should have in this small island separate legal states for different members of our community'.⁷²

The crux of the matter then, is whether Scotland should on these occasions formulate social policies which are distinctive and designed to meet its own particular requirements or whether legislative reform should be directed towards making the law north and south of the border roughly comparable so as to allow for uniform practice throughout

Great Britain. One preliminary answer at this stage might be that Scots Law need not be different to English law simply for the sake of being different, but it is important that political and administrative mechanisms exist whereby a decision can be taken to formulate different legislation when particular requirements appear to warrant it. In other words, individual instances of uniformity or divergence may not in themselves be as important as the capacity of Scottish Members to reach independent decisions on the appropriateness of uniformity or divergence in any given case.

Despite taking an opposing line to Galbraith, Rifkind rather surprisingly attempted to justify Galbraith's stance on previous Bills. He stated:

'He vindicated completely any suggestion that his opposition to previous measures was the result of any blind reaction and made it clear that it was because of his own very special belief that a more humane and sensible alternative could be put forward'.⁷³

The role and motives of Tam Galbraith will be discussed at a later stage.

The Government's position was given by Harry Ewing who indicated that the Government believed the existing law, with its emphasis on the concept of guilty and non-guilty parties, might not now reflect the views of the majority of people in Scotland. The Government was particularly pleased that the Bill provided an opportunity for the whole question to be debated fully.

The Bill proceeded to its Committee stage in March and was dealt with in four sittings. Right at the outset Tam Galbraith moved his complex series of amendments to alter fundamentally the structure of Clause 1. The amendments, however, were unceremoniously torn apart on the grounds of practicality. Harry Ewing, for the Government,

indicated that there would be a number of administrative difficulties in setting up the structure for conciliation. Malcolm Rifkind simply remarked that it would put the law of Scotland back some 500 years since its effect would be to remove the conditions of adultery, cruelty and desertion from Scots law. All in all the weight of the Committee was so overwhelming against the amendments that they were defeated in division by 12 votes to 1.

Another issue which provided a good illustration of the 'uniformity' versus 'divergence' argument concerned the period of five years' separation. Two amendments were tabled, one by Nicholas Fairbairn (Cons. Kinross and West Perthshire) who wished to see the period for unilateral divorce reduced from 5 years to 3, while the other, by Robin Cook, suggested a 4 year period. They both argued that there was no particular logic in the figure of 5 and that it was only included because it was the figure used in the English measure. Further, they were of the opinion that the difference between divorce where both spouses consented and divorce where consent was withheld should only be a minor one, since after 3 or 4 years of separation there was not much doubt that the marriage had broken down. In such situations there was no good reason to 'prolong the agony'. Cook put his case thus:

'We may find that there are further reforms of the English law on divorce within the not too distant future, and if we constantly bring ourselves into line with what the English have always done we are liable to find ourselves lagging behind and having to catch up with what they have just done'.⁷⁴

On the other hand it was argued by Malcolm Rifkind that the five year period would give the law a degree of uniformity throughout Britain. Although he was aware that public opinion in Scotland on the issue had changed he thought that the amendments were based 'on

a fundamental miscalculation of the public mood'. Further, he believed that there was 'grave concern amongst many people about the appropriate and desirable reforms which should be made in the law of divorce'.⁷⁵

In opposition to the amendments he argued:

'I believe that at a time when public attitudes are changing only slowly - perhaps merely evolving, if one welcomes the changes that are taking place - it is desirable in itself that the legislation that we support should not be too radical as to offend many who feel that their spouses have maltreated them'.⁷⁶

Lastly, it was his contention that,

'Much of the desire in Scotland for the reform of the divorce law stems from a widespread feeling amongst the public in Scotland that the criteria for divorce and other circumstances should be broadly similar throughout the United Kingdom'.⁷⁷

The arguments presented by both sides were nothing if not sincere and there was clearly great difficulty in trying to provide a rigid statutory period to accommodate such a large number of completely different cases and situations. What was of interest once again was the way in which the opposing schools of thought assessed public opinion. Cook's case was that opinion would accept a Scottish innovation to reduce the period of separation from five years to four, whereas Rifkind considered such a provision too radical for an evolving public consciousness. The underlying fear was that the amendment would undermine the regard in which the institution of marriage was held by the vast majority of Scottish people. The amendment was thus rejected and the period of separation retained at five years. That the 'uniformity' school of thought won through is perhaps indicative of a Scots penchant for caution. Nevertheless, the issue highlighted how different calculations of the public mood can prevail amongst MPs, affecting how innovative they are inclined to be.

Another example of an innovation thought to be 'moving too far too quickly' arose when George Reid (SNP, East Stirlingshire and Clackmannan) tabled an amendment to give jurisdiction in actions of divorce to designated sheriff courts concurrently with the Court of Session. He argued that such a provision would relieve the congestion in the Court of Session; contribute towards savings in expenses; reduce the inconvenience to partners in a divorce action who had to travel significant distances; and allow a fuller hearing of actions involving children and finance. However, the legal establishment was well represented on the Committee with Lord James Douglas-Hamilton (Cons. Edinburgh West), Nicholas Fairbairn and Malcolm Rifkind. All advocates, they opposed the amendment. It was argued by them that congestion would not in fact be relieved since many sheriff courts in Scotland were already overloaded, particularly in Glasgow where some three-quarters of Scottish divorces occurred; that expenses would not be reduced since extra administrative costs would be incurred; that it would have far reaching repercussions for the legal system and the legal profession; and that in any case, it would be best dealt with by a different Bill.

One must be careful in attributing to the legal profession ulterior motives in arguing for the retention of divorce actions in the Court of Session, but certainly self-interest is a consideration which cannot be lightly ignored. There would appear to have been a fundamental split in legal circles over the issue. On the one hand, the Law Society favoured the hearing of divorce cases in the Sheriff Court if that was the wish of the parties concerned, with option to go to the Court of Session left available. The Faculty of Advocates, on the other hand, rejected any such proposal and maintained that divorce ought to be heard only in the Court of Session.

When interviewed, one advocate offered reasons.⁷⁸ He rejected at the outset the argument that retention of divorce in the Court of Session was merely a ploy to keep young advocates in work and felt that this type of criticism only served to detract from the main issues involved. He considered it essential in matters such as divorce that uniform standards be maintained and this could only be done in the High Court. While it was not for him to cast aspersions on any sheriff, there was evidence to support the contention that there was a certain lack of uniformity in decisions throughout the country. Further, he thought that hearing divorce cases in the Court of Session in Edinburgh could not really be considered a gross inconvenience in a country the size of Scotland. In any case a shift of divorce proceedings would necessitate a major review of the jurisdiction of all Scottish courts.

These arguments, however, were viewed with some scepticism by the Law Society of Scotland. When questioned on the vociferous parliamentary opposition of the advocate MPs to divorce in the Sheriff Court, a spokesman for the Law Society would only say - 'One is entitled to draw one's own conclusions'⁷⁹; as oblique a comment as one might expect from that august body.

However, in the Committee debate the argument that was of most interest was the one presented by Douglas Henderson (SNP, Aberdeenshire East). While conceding that a very strong argument had been made on the grounds of cost and convenience in favour of the amendment, he felt that the proposed reform 'moved too far too quickly'. Admitting the reform to be desirable he advised the Committee 'to reflect carefully as to whether this is the right Bill in which to insert it, and to remember our responsibility to our constituents and the vast bulk of the Scottish people in attempting to bring about a reform in the

law which has taken so many years and involved so many people',⁸⁰

It was perhaps something of an irony that it was a member of the SNP who was pleading for restraint on a Scottish social reform. SNP colleague Margaret Bain (SNP Dunbartonshire East) also concurred:

'I think most of us here want to see the reform in terms of the concurrent jurisdiction going through also, but most of us are worried that we could lose the basic premise of this Bill by trying to be too radical at this time'.⁸¹

In a similar vein the Government position was given by Harry Ewing who argued that,

'this is a desirable provision, but unfortunately, certainly for the moment and for a few years ahead, it is not a practical proposition, and it could easily be overtaken by the report of the Royal Commission'.⁸²

The amendment was in the end rejected by the smallest of margins - by 7 votes to 6 (Table 8.15). The most striking feature of this division was the solidarity displayed by the advocates! Ronald King Murray (Lord Advocate), Lord James Douglas-Hamilton, Nicholas Fairbairn and Malcolm Rifkind all combined to vote against the amendment. However, there seems little doubt that if it had been passed in Committee it would have been rejected on Report, otherwise the Bill would have been in serious jeopardy. Thus for the sake of a reform in the principle of the law, rather than in the procedure, the concurrent jurisdiction amendment was sacrificed.

TABLE 8.15 House of Commons Parliamentary Debate, Second Scottish Standing Committee, 24th March - 7th April, col. 194.

Ayes	Noes
Bain, Margaret (SNP)	Advocate, the Lord (Lab.)
Cook, Robin (Lab.)	Douglas-Hamilton, Lord James (Cons.)
Hughes, Robert (Lab.)	Ewing, Harry (Lab.)
Reid, George (SNP)	Fairbairn, Nicholas (Cons.)
Small, William (Lab.)	Henderson, Douglas (SNP)
Sproat, Iain (Cons.)	MacCormick, Iain (SNP)
	Rifkind, Malcolm (Cons.)

The Bill was Reported, read a Third Time and passed to the Lords in the month of June. By now there was little controversy left surrounding the issue and the remainder of the Bill's passage was more or less a formality. However, one exchange in the Lords highlighted the procedural difficulties which had plagued the reform. Lord Wilson of Langside complained of the unacceptable delay in the reform of the divorce law and found it 'deplorable that we should have had to wait seven years for remedial action'. He queried:

'... in light of the much more effective handling of an analogous situation some 40 years ago, has the Minister ... reviewed the matter with a view to avoiding similar delays arising in other areas of equal importance to the people of Scotland? I imagine that he would readily agree that to neglect such a review, after the regrettable history of this situation, would be the reverse of competent government. I venture the view somewhat tentatively that if, over the last decade or two, there had been more meticulous attention to this kind of thing by Scottish Office Ministers there might be less political restlessness in Scotland today'.⁸³

Lord Kirkhill, the Government spokesman, refused to be drawn however, dismissing the issue as being irrelevant to the Bill. He would only comment that 'the pace of legislation of this kind should be related to the rate of public and social acceptance of it on the Scottish scene and in my view the pace and timing was about right'.⁸⁴

It is to this 'pace and timing' of the reform that we turn in the next section.

VII. Obstacles to Reform and the Swing in Opinion.

English divorce law was reformed in 1969 yet a Scottish measure did not appear in the statute book until 1976. How can this 'delay' be explained? What were the 'obstacles' to reform? Was there a 'swing' in public opinion and how can it be accounted for?

One principle reason, already outlined, for the delay in the Scottish reform was insufficient support for it amongst Scottish MPs in the early part of the seventies. Voting on the Hughes Bill revealed a Scottish majority against reform as most MPs around this time assessed Scottish opinion as unsympathetic to the measure. In addition, while certain sectors of 'informed' opinion had come out in favour of divorce law reform there was virtually no active organised pressure to promote change. These points have been discussed more fully in an earlier section and need not be repeated here. In this section the aim will be to focus on some of the less overt reasons for the delay in divorce law reform in Scotland.

A contentious issue throughout the whole protracted struggle for divorce reform was the question of parliamentary time. A number of MPs felt that there was insufficient time devoted to the issue which was indicative of Parliament's inability to handle Scottish business effectively. Scottish Nationalist, George Reid, extrapolated a case for a Scottish Assembly on these grounds. He argued:

'If there has ever been a well established case for Scottish law being brought back to the Scottish people through the agency of a Scottish Parliament, it is the long and sorry story of six years delay in introducing a measure such as this'.⁸⁵

Reid also found support from a rather strange parliamentary bedfellow in the shape of Lord James Douglas-Hamilton, who contended:

'Although Scotland may have less than 10 per cent of Britain's population, we need more parliamentary time allocated to us. This Bill is a good case in point. There is not sufficient time when Scottish Bills become of importance and relevance to a large number of Scotsmen'.⁸⁶

What was particularly galling to a number of Scots at this time of devolution fervour was that the English reform of the sixties had been allocated parliamentary time in order to secure its passage

whereas the Scottish reform attempts of the seventies were consistently denied any such assistance. Robert Hughes explained though, that this was something of a red herring since there were different administrations in the sixties and early seventies. He disclosed that the Labour Government of 1964-70 had been favourably disposed towards allocating time for Private Members' Bills which it thought socially beneficial. In this way the Abortion Bill, the Divorce Bill and the Homosexuality Bill had all been given parliamentary time to enable them to be enacted, without the Government ever adopting formal sponsorship. However, the Conservative Government of 1970-74 was opposed to giving parliamentary time to Private Members' legislation, adopting the policy that each Bill must stand or fall on its own merits.

Donald Dewar concurred with this argument and added that it had to be remembered that the Bills in question in the late sixties had proceeded quite a long way on the legislative path and had engendered considerable support over a period of time. This, he felt, was different from giving parliamentary time from the start to an issue on which feeling still had to be sounded.

On these grounds he could 'not accept a conspiracy theory against Scottish business as a lot of time was devoted to Scots Law, more than people realised'.⁸⁷ However, this was not to deny that some of the delay might possibly be attributed to certain aspects of procedure. The Private Members' system probably contributed to the delay on two counts. Firstly, the system was quite literally a lottery and it needed not only a Scots Member to win a place in the first eight, but also one who was sympathetic. Secondly, there was the problem of getting the measure through even if a ballot place was won, as only a limited number of reforms ever stood a realistic chance of being enacted. He commented though, that these problems, while arguably

contributing to the delay of Scottish divorce law, were difficulties which faced all Private Members who wished to legislate, and were not particular in any way to Scots Members.

One of the MPs most closely involved in the English reforms of the sixties was Leo Abse, who revealed the background to those measures. He indicated that it had been a great advantage to him to have 'allies in the Government who were ready to battle for time'.⁸⁸ Those allies were John Silkin, the Government Chief Whip, and Roy Jenkins, the Home Secretary, who were prepared to assist major pieces of social legislation with parliamentary time in those cases where the House had indicated its approval of the proposed reform. Thus, personal contact and friendship between Abse and high ranking Ministers in the Labour Administration were of the utmost importance to the English social reforms of the late sixties.

It was probably such personal contact that enabled him to write later:

'I have been too long in the Commons in any event to elevate importance to procedures and rules. Members in recent times have squandered years of effort devising changes in our procedure and rules in the magical belief that this will improve our government. Procedures, however, are man-made and can be man-avoided. I have never found any rule or procedure in the House which effectively obstructed me from obtaining my objective: rules, however, must be shyly dodged and of course, simultaneously, elaborate overt genuflections must be made to them'.⁸⁹

Such a statement, however, may be more reflective of Mr. Abse's confidence, dynamism, intelligence and personal influence as a backbencher, than of the experience of less able backbench colleagues. When it was put to him that his own experience might be somewhat less than typical, he did qualify his original statement. He responded that he did 'not mean to suggest that the machinery is of no importance, more that people tend to blame the machine instead of themselves'.⁹⁰

In this respect then, Abse's apparently limitless energy and drive can be considered a factor of vital importance in the reform of English divorce law.

Strangely enough, although by an altogether different route, Lord James Douglas-Hamilton has since come to the similar conclusion that parliamentary rules are there to be used. Given his party's current line on devolution, a rather embarrassed Lord James has had to backtrack on some of his statements of the mid-seventies. He has tried to justify his rather exuberant outburst in favour of more time for Scottish business, and even a Scottish Assembly, on the grounds that he had had only 'a limited experience of the House'. He has since commented:

'If opportunities within the rules of the parliamentary system are properly used, such matters can be dealt with. The fact that legislation did not go through earlier may have been because Scots MPs did not feel sufficiently strongly. If they had, it might well have been possible to have got Private Members' legislation through'.⁹¹

Parliamentary time must be considered an important factor contributing to the seven year 'delay' in Scottish divorce reform, although one must be careful as to the reasons why. The Private Members' Ballot system, with its emphasis on pure chance, had an effect. Yet as Donald Dewar pointed out, this system operated for all MPs and its drawbacks and pitfalls apply to the entire House and not just to Scottish Members. However, in the Scottish case, even although there were repeated attempts to initiate reform, the Government of the early seventies were unwilling to assist with parliamentary time, as the previous administration had done in the sixties. Further, Scotland did not have a character like Leo Abse pushing for reform. His drive and enthusiasm, along with his personal influence, greatly assisted English reform. Nor, it would appear, did Scotland have a particularly

sympathetic ear in the Cabinet to appeals for reform, as was the case in England. This was another important factor.

Scotland's man in the Cabinet is the Secretary of State for Scotland and during the period in question there were three different Scottish Secretaries, Gordon Campbell (1970-74), Willie Ross (1974-76) and Bruce Millan (1976-79). Gordon Campbell, it seems, was not particularly interested in the issue and had 'no great convictions about it either way' according to his fellow Conservative Iain Sproat. That, in combination with that Government's general policy on Private Members' legislation, put paid to any hopes for assistance of parliamentary time. His successor, Willie Ross, was even less favourably disposed to reform, indicated the same source. A number of other MPs confirmed Willie Ross's reluctance to get involved in the issue. Neil Carmichael, for instance, felt that Ross's Calvinist persona prevented the reform from making any progress. Robin Cook had personal experience of this. He indicated that on his own Bill in 1975 he had asked Bob Mellish, the Government Chief Whip, for parliamentary time by putting down a motion to have the Second Reading in the Scottish Grand Committee. Mellish accepted the motion and sent a letter to that effect, but because of the Easter recess Cook did not receive it for some weeks. However, in the interim period Willie Ross came to learn of this concession and so had exerted pressure on Mellish to withdraw the offer, which he subsequently did. Cook conceded that there was every chance that the motion would have been voted down, but the important thing was that it would have been on the Order Paper and therefore would have had to receive some discussion. He was later to write:

'We shall not know why the Government steadfastly refused throughout 1975 to grant time for Scottish

divorce law reform until those involved publish their memoirs, and perhaps not even then. At the time it appeared to be sheer obstinacy...'.⁹²

It is impossible to know for sure since public access to the Legislative Committee of the Cabinet is not permitted, but the finger of suspicion does point towards the higher echelons of the Scottish Office.

This scenario fits well with the remarks made by one very prominent figure in the Scottish Office in the mid-seventies. He said that Ross's main interest was Scottish economic issues and in this respect 'he had a tremendous grasp of Scottish industrial problems'. He sincerely thought that 'history would show Willie to be one of the great Scottish Secretaries'. However, 'as far as social reforms were concerned, Willie Ross was not an innovator'.⁹³

The influence of the third Scottish Secretary of this period, Bruce Millan, in the divorce issue was negligible in the sense that the MacCormick Bill had already made good legislative progress by the time he took office. However, his thoughts on the matter are worth referring to. The issue, he said, traditionally rested with Private Members' legislation, but this was not necessarily nor wholly right. He felt that 'if it is an important enough issue there is no reason why the government should not provide time'.⁹⁴ However, the reason why governments were reluctant to do so was that the government usually ended up getting itself into difficulties. In allocating parliamentary time to one issue they were then subjected to demands to allow time for competing issues. Rather than be faced with the problems that such a situation presented, governments preferred to adopt a stance of neutrality and assume a low profile in matters which were of concern to Private Members.

Another individual figure to feature prominently in the divorce debates was T. G. D. Galbraith, who was by far the most controversial antagonist to reform. He opposed reform vehemently throughout the early seventies and personally took it upon himself to be present on every occasion that a Bill came before the House on a Friday afternoon for Second Reading in order to object to its progress. Cook viewed this occurrence, as noted earlier, as an 'elegant little ritual', whereas Galbraith looked upon Cook's approach as 'arm-twisting' and accused him of 'character assassination'. Cook has since suggested that Galbraith's dogged opposition did more than anything else to marshall public opinion in favour of divorce law reform. Others, however, have argued that Galbraith was the victim of gross misrepresentation. So how then, is Galbraith's position to be viewed? What were his motives for such fierce and persistent opposition?

Perhaps it is only fair to let the man himself speak first:

'I thought, where there was a different legal system, Mr. Hughes' Bill was introduced too soon after the English legislation to benefit from experience of it. As for Mr. Cook, he was in such a hurry he wanted to legislate without ever having a Second Reading debate on the principles of what was trying to be done'.⁹⁴

His main reason then, was that he was objecting to the Second Reading debate 'going through on the nod'. He was backed up in this by his colleague Malcolm Rifkind who said that;

'Tam Galbraith emphasised all along that his opposition was on the grounds of parliamentary principle. He was fundamentally opposed to a Second Reading going through on the nod. This obviously could be frustrating to other MPs. However, he was opposed on principle to a piece of legislation passing forward without an opportunity for proper debate'.⁹⁵

He had publicly defended Galbraith because he felt 'his opposition was sincere and was based on an alternative, and was not just for the sake of being obstinate'.⁹⁶ Although he defended his right to have an

alternative proposal he did not necessarily agree with the proposal itself.

Similarly, Harry Ewing felt that Galbraith 'fully explained his position on Second Reading where he introduced the idea of family centres'.⁹⁷ Ewing was of the opinion that Galbraith objected for 'valid democratic reasons' since he wanted a chance to explain his position fully in a proper debate on the issue. He thought that Galbraith had made some very good contributions on Committee, but had often been 'badly misrepresented'. This sentiment was shared by Donald Dewar who suggested that 'he was perhaps not as dishonourable as the press made out'.⁹⁸

Another of his colleagues, Lord James Douglas-Hamilton, indicated that 'the reason he stated in public was that he was opposed in principle to the Bill going through the Second Reading on the nod'.⁹⁹ Given such a carefully worded reply had there been any other reason? 'No', responded Lord James, it had not been his intention to imply that there had been any other reasons. 'Strictly speaking', he added, 'MPs should not say what their colleagues views are'.

One MP who did think that there might have been other reasons was Neil Carmichael who felt that 'Tam's divorce may have had its effect'. Also he thought that Galbraith had never quite recovered from being removed from Ministerial office in the early sixties. He revealed, 'Tam had all the makings of a future Secretary of State, but he was shattered at being sacked by MacMillan over Vassal'.¹⁰⁰

The fact that Galbraith had been divorced under English law while opposing Scottish reform was a matter of public knowledge. What was not widely known though was the circumstances and the effect of the divorce upon him. One MP who did not wish his comments to be attributed, remarked that Galbraith was 'psychologically distraught over his

own divorce'. It would appear that Galbraith's wife had left him for his increasingly homosexual tendencies and that he could not come to terms with being abandoned. 'His inner torment was transferred to the public sphere where he single mindedly opposed divorce reform'.

Such an insight reveals something of the 'assumptive world' of Galbraith and tends to fit into the 'psycho-political' analysis that Leo Abse used to assess the motivations of his fellow MPs. Abse has written that 'politicians can use public events as a screen upon which to project private travail'.¹⁰¹ His argument is that:

'... there remains a stubborn refusal to face the fact that no less fateful consequences flow from the psychopathology of our leaders. Their actions are fundamentally influenced by the quality of their reality testing. If their feelings, affects and emotions so distort external events, then their relations to them may, with lamentable consequences for us all, be singularly inappropriate. We cannot therefore extend to the public man the same rights of privacy to which the private citizen is entitled'.¹⁰²

The analysis though, is not without its difficulties. The statement by the MP which ascribes to Galbraith's behaviour motives arising from his psychological state cannot, in any formal sense, be verified. The validity of the MP's inference is based upon his own assessment of the situation, and this in turn may reveal something about the observer's own assumptive world and psychological state. The inference then, is acceptable only in so far as it remains an assertion. It is valid in as much as it is 'one man's opinion'.

The role of Tam Galbraith in the divorce issue was then a rather complex affair. On the one level the explanation for his recalcitrance lay in his objection on principle to a reform Bill proceeding without proper debate. On another level it lay in his psychological disposition towards the subject, a disposition attributed to him by a fellow MP, and a disposition which implied a subliminal hostility towards

divorce reform. Corroborative proof that it was the second of these reasons, rather than the first, that propelled him to obstruct the passage of the reform, is difficult, if not impossible to obtain. Given the nature of his circumstances, one can only say that his emotional state may have had some bearing on his judgement concerning divorce law reform. Whether it did or not, there can be no denying that Tam Galbraith, for whatever reasons, was one of the major 'obstacles' to reform. Moreover, his obstructionism seems to have been at least one of the factors involved in arousing public awareness on the issue.

Another factor which played a part in bringing the divorce issue to the attention of the public was the 'cross-border problem'. Under the Domicile and Matrimonial Proceedings Act 1973 it was possible to obtain a divorce in an English court if a period of residence in England could be established by the parties involved. This led to a situation where people were shifting from Scotland to live in England in order to obtain a divorce under English law. In the opinion of Harry Ewing the desire for Scottish reform stemmed largely from the public reaction to this 'cross-border problem'. 'As this problem became more acute it highlighted the need for reform', he said.¹⁰³ Dennis Canavan similarly remarked that 'the old laws were certainly anomalous and there was no doubt that shady practices concerning the switching of domicile, arranged adultery, etc., were evident'.¹⁰⁴ The Law Society of Scotland also agreed that during the time the law in the two countries was out of line there had been a great many instances where domicile had been changed so that the divorce action could be made in England. The Society felt that this was unsatisfactory. A member of the Faculty of Advocates, Mr. Menzies Campbell, thought it important however, not to overemphasise this one

factor. It was not really the number of cases that was of importance, it was the 'sense of injustice' that was engendered by the law of the two countries being different.

This 'sense of injustice', that Scotland was being denied advantages which English already possessed, was of considerable importance in helping to swing widespread public feeling in favour of divorce law reform. Donald Dewar commented, 'the fact that the English already had it assisted'.¹⁰⁵ Malcolm Rifkind felt that by 1976 there had been a sufficient change of opinion to allow the MacCormick Bill to proceed with relatively little opposition. One reason for this change was the relative success of the English measure and the realisation of the need for comparable legislation in Scotland. He said:

'By 1976 the need to modernise the law was not a controversy. There was some dissent as to how it should be modernised - some for instance wanted to reduce the separation period or have divorce in the sheriff court - but the majority were certainly agreed on the need to have a roughly comparable divorce law for Scotland'.¹⁰⁶

Robert Hughes spoke in the House in 1976 of this transition in public feeling:

'It is often said in discussions that Parliament is insensitive to public opinion. I am not sure that this is true. It may be that what happened in 1971 reflected public opinion at that time; public opinion may not have been ready for a change. Indeed, I had many letters at the time to the effect that Scotland by that measure would merely be hanging on England's coat tails. My correspondence has now changed. Its tone now is to the effect that it is wrong that England should have advantages denied to Scotland. It is a curious anomaly flowing from separate legal systems'.¹⁰⁷

Robin Cook has also identified this swing in opinion in his analysis. He has estimated that the tide of opinion turned at around the time of his own reform attempt in 1975 due to the public's frustration at its prolonged obstruction in Parliament. Consequently, it is his

contention that the reform of Scottish divorce law was delayed, not through lack of parliamentary time, but because a majority of Scottish Members were opposed to change until the mid-seventies. He has argued:

'It is not surprising that some MPs smart under the injustice of a public opinion that blames them now for not implementing ten years earlier reforms which that same public opinion would probably not have tolerated at the time'.¹⁰⁸

While this chapter has acknowledged the role of MPs and their appraisal of public opinion as being an important factor in the 'delay' of Scottish divorce reform, this section has endeavoured to bring to the fore other important reasons why Scottish reform took seven years longer to achieve than its English counterpart. It is here contended that the factors outlined in this section, viz. parliamentary time (albeit conditional upon the qualifications expressed earlier); the influence of key political actors, i.e. the Secretary of State for Scotland; and the motivation of the 'lone campaigner' against reform in the shape of Tam Galbraith, were also important considerations contributing to the 'pace and timing' of the legislative reform of the divorce laws.

VIII. Conclusion

The divorce reform is another issue which has to be viewed in the context of the political climate in Scotland in the 1970s and also in the context of Scottish history. It has already been noted on several occasions that after the Union of 1707, Scotland, although assimilated politically, maintained its 'civil society' of which the Church, the education system and the legal system were concomitant parts. It not only retained distinctions in certain areas of law but also preserved some of the differences in social mores. The divorce issue highlighted these differences yet at the same time illustrated the duality in

Scottish politics, being both dependent and independent within the wider British system.

Organised pressure for and against change was confined in England to a relatively small number of bodies and in Scotland to an even smaller number. As far as the major professions were concerned, medicine had very little to say on the subject. This left the churches and the legal profession as the main protagonists in the debate. In England, the Divorce Law Reform Union, a single-issue pressure group, made an important contribution towards achieving reform, but in Scotland no such equivalent group appeared on the scene to lobby as forcefully for change.

The parameters of the divorce debate were very much set by the events in England. The appearance of the Church of England's 'Putting Asunder' in 1966 and the Law Commission's review 'The Field of Choice' set out the main options for consideration. The following year the Scottish Law Commission's 'Divorce: The Grounds Considered' more or less adopted the same recommendations, revising them only to meet the requirements of Scots Law. It was not until the 1968 General Assembly that the Church of Scotland came out with independent proposals for Scotland. They were to prove the most radical proposals of all. Now while the Church of England and the Law Commission were able to find common ground and work out a set of compromise recommendations which were eventually to form the basis of the reformed English law, the Church of Scotland and the Scottish Law Commission found it much more difficult to reach this common position. The result was that while both the Church of Scotland and the Scottish Law Commission, and indeed the Law Society of Scotland and the Faculty of Advocates, favoured reform, none of them could agree which type of reform would be most appropriate. With no common ground there was a lack of unified

(or uniform) pressure for change throughout the first half of the seventies. On the other hand the Roman Catholic Church in Scotland, because of its doctrinal teachings, was single minded in its opposition to any proposed reform. This influence seems to have had an effect on at least some MPs.

The role of different governments was of particular importance to the success or failure of the various reform attempts and attitudes within Labour and Conservative administrations varied markedly on the issue. There is no doubt whatsoever that the allocation of parliamentary time to Alec Jones' Divorce Reform Bill in the 1968-69 Session was crucial to the success of that provision. This, of course, was a feature of the 1966-70 Labour administration which gave additional time to other Private Members' Bills considered to merit fuller public debate than Private Members' business allowed. The liberal attitudes of the Home Secretary of the period, Roy Jenkins, and the Government Chief Whip, John Silkin, had much to do with this generosity. In stark contrast the 1970-74 Conservative government made it known that Private Members' legislation would have to stand or fall on its own merits since no extra parliamentary time would be forthcoming, irrespective of the perceived importance of the issue. And this stance was maintained by Labour's Willie Ross when he returned to the Scottish Office in 1974.

Since divorce was an issue involving a free vote, party politics did not feature in the debate in the same way as with whipped legislation. But it was interesting to record the skirmish between the parties over the 1964 Divorce (Scotland) Act and to speculate on the motives behind its introduction just before an Election. Labour, of course, perceived the Bill to have been introduced to stir up internal religious disputes and to tarnish the Party as being unnecessarily

obstructionist in its attitude. That incident and the different approaches of successive Labour and Conservative governments apart, the issue does appear to have engendered a fair amount of cross-party voting.

Being a subject for Private Members, the role of individual MPs was of paramount importance. Without any shadow of a doubt the most influential MP in the English divorce reform was Leo Abse. He was the one who rekindled the debate in the early sixties and later persuaded first William Wilson and then Alec Jones to promote Private Member's Bills. And it was Abse who cajoled the Labour Cabinet (through Jenkins and Silkin) into granting additional parliamentary time for debate.

In the protracted struggle for Scottish reform a number of Scots MPs featured prominently. Donald Dewar, Robert Hughes, Willie Hamilton and Robin Cook were all active in urging divorce reform in the early and mid-seventies. It is interesting to note in the passing that they were all Labour MPs although Conservative support was forthcoming from Alick Buchanan-Smith, the Earl of Dalkeith and Malcolm Rifkind. However, the most influential figure in the Scottish divorce issue did not reside in the ranks of the supporters of reform, but in the opposing ranks. Tam Galbraith single-handedly opposed the progress of a number of Divorce Bills on countless occasions. His motives have been discussed at length earlier, but ironically his dogged opposition may have had the reverse effect from that intended, by focusing public opinion on the need for reform. Also, Willie Ross, as Secretary of State in the mid-seventies, must be considered a figure of influence. It was upon his unsympathetic ear that the reformers' pleas for parliamentary time fell, pleas which were greeted with the official response that divorce was a matter for Private Members' legislation.

Parliamentary procedure was of critical importance in both the English and Scottish reforms. The biggest hurdle that a Private Members' Bill has to overcome is lack of parliamentary time. Due to the vagaries of Private Members' Business, only a very limited number of such Bills stand a realistic chance of success. However, the English reform Bill of Alec Jones, which came only ninth in the Ballot, was greatly assisted by the additional time allocated by the Labour government. In stark contrast this facility of extra time was never accorded to any of the Scottish reform attempts in the 1970s and it was postulated above that this was due initially to the policy of the Conservative administration and latterly to the persona of Willie Ross.

A government's position on the allocation of additional parliamentary time can vary dramatically. However, in reply to a parliamentary question in April 1967 about the government's principles when deciding to provide time for Second Reading debates on Private Members' Bills, Richard Crossman, then Leader of the House, spelled out some of the criteria.¹⁰⁹ The considerations included the state of the Government's own programme; the prospects of the Bill in Private Members' own time, and the effect on other Private Members' legislation; the amount of interest in and support for the measure; the progress the Bill had made; and the government's attitude to the Bill.

Thus, public interest in a Bill can affect its chances. In the case of Scottish divorce reform the influence of public opinion was open to varying interpretations. On the one hand, some MPs felt that the fact that a Bill had been introduced in virtually every Parliamentary Session of the first half of the 1970s was indicative of a public desire for reform, whereas on the other hand, opposing feeling was that the continued *failure* of Private Members' legislation was an

indication that opinion was against it. Of course, those who adopted the former position tended to support reform while those who favoured the latter interpretation were more inclined to oppose it.

Defining public opinion is problematical. It was V. O. Key who suggested that to talk with precision of the idea of public opinion was a task not unlike coming to grips with the Holy Ghost.¹¹⁰ Therefore, it is important to outline the different categories of public opinion under discussion. Public opinion is rarely, if ever, homogeneous and so cannot be reduced to a single type. It has been suggested in this chapter though, that it may be possible to reduce it to a limited number of types in which predominant or prepondering opinion can be established. The categorisation adopted here has been based on MPs' appraisal of feeling at large, organised opinion in pressure groups and views expressed in and by the media. These categories are to a certain extent arbitrary and others may view public opinion differently. However, the important point is that whatever the categorisation adopted it must be made explicit.

This chapter has suggested that what MPs thought about public opinion on the divorce issue depended a great deal on their own values and beliefs and on *who* they took to *represent* public opinion. As Hall et al have noted:

'Assumptions about the pervasiveness of certain public values and beliefs are moulded by the values and beliefs of those who do the judging, as well as by the sources from which they obtain their information'.¹¹¹

The tendency, therefore, was for MPs to utilise and quote that section of public opinion which did most to support their personal predilections. That is why, during the course of the debates, there was such an abundance of confusion as to the state of Scottish public opinion, because very often MPs would be using different categories and talking

at cross purposes.

An expression of Lord Windlesham can be aptly applied to Scottish opinion at large on the divorce issue:

'In the sense of popular opinions widely held, public opinion is more of a negative, limiting factor: a way of estimating what the public will stand for rather than an expression of what the public wants'.¹¹²

From this standpoint, Scottish MPs appear to have felt, at least in the early 1970s, that Scottish opinion would not, in this sense, 'stand for' divorce reform.

The positions of the principal pressure groups have been well aired. Suffice to repeat here that their lack of agreement and the lack of any sustained lobbying on their part added further to the confusion over the state of public opinion. In contrast the Scottish press was more consistent. 'The Scotsman', 'Glasgow Herald' and 'Daily Record' all repeatedly drew attention to the anomalies which existed in the law north and south of the border and urged that parliamentary time be found for a proper discussion of the issue. The more 'delay' was perceived the more aggrieved became the reports.

The perceptions of those within Parliament also greatly influenced the course of events. The values of Tam Galbraith and Willie Ross, already noted above, were probably the easiest to identify. But the values of others did impinge upon the political history of Scottish divorce reform in lesser ways. The opposition, for instance, of the advocates in Parliament, Lord James Douglas-Hamilton, Nicholas Fairbairn and Malcolm Rifkind to the amendment to give jurisdiction to designated sheriff courts concurrently with the Court of Session has to be understood in relation to their 'assumptive world'. An opposition based on professional self-interest, while difficult to prove, is certainly something which should not go unconsidered. As in the

other case studies then, values, notwithstanding the methodological problems associated with their identification, have to be taken into account when trying to explain why particular policies emerge as they do.

While there were clear differences in the way in which the divorce reforms north and south of the border came to be enacted, the differences in policy content, at least in terms of the general principles, were not so obvious. What differences did exist lay largely in the technical and legal requirements of Scots Law. The Scottish divorce reform then, was very much influenced by the norms which already prevailed south of the border.

Yet, the 'swing in opinion' and, ultimately, the acceptance of divorce reform resulted from changing social and political circumstances which effectively increased native awareness of Scotland's 'disadvantages'. A 'sense of injustice' developed in the mid-70s concerning both the nature of the reform and the procedure available for obtaining it. Not only was it a case of Scotland not having as liberal a law as prevailed in England, it was also another manifestation of the wider search for a Scottish identity, political and otherwise. Scottish business was being brought into question as part of the much broader debate on constitutional reform.

Robin Cook has perceptively spotted a paradox in this: that the pressure for uniformity in personal law should have come at a time when popular opinion also appeared to want a separate legislature for Scotland in order that it might pass its own different laws.¹¹³ The demand for divorce reform was in part a product of the new social confidence and political aggressiveness of the period; but it was also in part a product of Scotland's historical position within the British political system.

It is again being suggested in this conclusion that the 'Scottish dimension' in this particular reform lies in all of the aspects discussed above, that is, in the lack of agreement amongst the principal interest groups - the churches and the legal profession - and in the lack of any single issue pressure group pushing for reform; in the varying degrees of sympathy displayed towards the issue by successive Labour and Conservative administrations; in the actions of individual MPs and in the values they brought to bear upon the matter; in the confusion over the state of Scottish public opinion; and in Scotland's ambiguity towards change. Separate Scottish laws may engender separate politics and administration, but they need not always engender separate policies.

1. H. of C. Parl. Deb., Vol. 794, col. 1208.
2. *ibid.*
3. *ibid.*, col. 1209.
4. Church of Scotland, Women's Committee on Social and Moral Welfare, 'Divorce Law Reform: Some Questions and Answers', 1970, p. 5.
5. H. of C. Parl. Deb., Vol. 794, col. 1210.
6. H. of C. Standing Order No. 32 (Majority for Closure).
7. H. of C. Parl. Deb., Vol. 809, col. 1460.
8. *ibid.*, col. 1496.
9. *ibid.*, col. 1476.
10. *ibid.*, col. 1476.
11. *ibid.*, col. 1536.
12. *ibid.*, col. 1505.
13. *ibid.*, col. 1496.
14. *ibid.*, col. 1495.
15. *ibid.*, col. 1480.
16. H. of C. Parl. Deb., Vol. 873, col. 1115.
17. H. of C. Parl. Deb., Vol. 884, col. 1244.
18. Robin Cook, 'Parliament and the Scots' Conscience', Scottish Government Yearbook 1978, Edinburgh, Paul Harris, p. 102.
19. Church of Scotland, Divorce Law Reform Memorandum for the Legislation Sub-Committee of the Moral Welfare Committee, Nov. 1972, p. 2.
20. *ibid.*, p. 1.
21. Church of Scotland, Moral Welfare Committee, Report of Meeting with Representatives of the Scottish Law Commission, 12th Dec. 1973, p. 3.
22. A. M. Johnston, The Journal of the Law Society of Scotland, March 1968.
23. Letter from Lord Dunpark, to the Convener of the Moral Welfare Committee, 15th February 1974.
24. Scottish Law Commission, Memorandum on Divorce Law Reform, March 1974, p. 2.
25. *ibid.*, p. 10.
26. Church of Scotland, Report of the General Assembly 1975, p. 341.
27. Church of Scotland, Department of Social Responsibility, Recommendations of Legislation Working Party, December 1975, p.3.

28. P. Hall, H. Land, R. Parker and A. Webb, *Change, Choice and Conflict in Social Policy*, London, Heinemann, 1975.
29. Catholic Press Office, press release, 2nd April 1973.
30. *ibid.*, press release 14th March 1975.
31. H. of C. Parl. Deb., Vol. 809, col. 1547.
32. Robin Cook, *op. cit.*, p. 102.
33. Interview with Neil Carmichael MP, 25th March 1981.
34. Interview with Iain Sproat MP, 26th March 1981.
35. *ibid.*
36. Interview with Robert Hughes MP, 24th November 1980.
37. Neil Carmichael, *op. cit.*
38. Iain Sproat, *op. cit.*
39. *ibid.*
40. Anthony Barker and Michael Rush, *The Member of Parliament and His Information*, London, Allen and Unwin 1970, p. 18.
41. Interview with Harry Ewing MP, 26th November 1980.
42. *ibid.*
43. Interview with Leo Abse MP, 26th March 1981.
44. Iain Sproat, *op. cit.*
45. Interview with Robin Cook MP, 27th February 1981.
46. Edmund Burke, *Speeches and Letters on American Affairs*, cited in Peter G. Richards, *Honourable Members*, London, Faber and Faber, 1959, at p. 158.
47. *ibid.*, p. 161.
48. Daily Record, 23rd January 1973.
49. Glasgow Herald, 19th January 1973.
50. *ibid.*
51. *ibid.*
52. *ibid.*, 26th January 1973.
53. *ibid.*, 1st March 1973.
54. *ibid.*, 12th May 1974.
55. Daily Express, 22nd January 1975.
56. Glasgow Herald, 22nd January 1975.
57. *ibid.*, 2nd March 1975.
58. Aberdeen Press and Journal, 12th April 1975.
59. Daily Mail, 10th April 1975.
60. The Scotsman, 15th May 1975.
61. The Sunday Times, 29th June 1975.

62. Scottish Daily News, 11th July 1975.
63. The Scotsman, 19th December 1975.
64. Daily Express, 26th February 1976.
65. Daily Record, 18th March 1976.
66. Evening Times, 2nd December 1976.
67. H. of C. Parl. Deb., Vol. 906, col. 767.
68. *ibid.*, col. 777.
69. *ibid.*, col. 782.
70. *ibid.*, col. 782.
71. *ibid.*, col. 793.
72. *ibid.*, col. 811.
73. *ibid.*, col. 811.
74. H. of C. Parl. Deb., Second Scottish Standing Committee, 24th March 1976.
75. *ibid.*, col. 86.
76. *ibid.*, col. 88.
77. *ibid.*, col. 89.
78. Mr. Menzies Campbell.
79. Interview with Mr. K. W. McGregor, 14th November 1980.
80. H. of C. Parl. Deb., Second Scottish Standing Committee, 24th March 1976, col. 179.
81. *ibid.*, col. 186.
82. *ibid.*, col. 188; the reference was to the Royal Commission on Legal Services in Scotland.
83. H. of L. Parl. Deb., Vol. 372, col. 975.
84. *ibid.*, col. 977.
85. H. of C. Parl. Deb., Vol. 906, col. 813.
86. *ibid.*, col. 817.
87. Interview with Donald Dewar MP, 25th March 1981.
88. Leo Abse, *op. cit.*
89. Leo Abse, Private Member, Macdonald, London 1973, p. 127.
90. Leo Abse, Interview, 26th March 1981.
91. Interview with Lord James Douglas-Hamilton MP, 20th March 1981.
92. Robin Cook, Scottish Government Yearbook, 1978, p. 103.
93. Unattributable interview.
94. Private letter from T. G. D. Galbraith, 4th November 1980.
95. Interview with Malcolm Rifkind MP, 16th March 1981.
96. *ibid.*

97. Harry Ewing, *op. cit.*
98. Donald Dewar, *op. cit.*
99. Lord James Douglas-Hamilton, *op. cit.*
100. Neil Carmichael, *op. cit.*
101. Leo Abse, Private Member, p. 253.
102. *ibid.*, p. 251.
103. Harry Ewing, *op. cit.*
104. Dennis Canavan, *op. cit.*
105. Donald Dewar, *op. cit.*
106. Malcolm Rifkind, *op. cit.*
107. H. of C. Parl. Deb., Vol. 906, col. 779.
108. Robin Cook, Scottish Government Yearbook, 1978, p. 104.
109. H. of C. Parl. Deb., Vol. 745, col. 1152.
110. V. O. Key, Public Opinion and American Democracy, New York, 1964.
111. P. Hall, H. Land, R. Parker and A. Webb, *op. cit.*, p. 484.
112. Lord Windlesham, 'Can Public Opinion Influence Government' in
R. Rose (ed), Studies in British Politics, London,
Macmillan, 1966, p. 154.
113. Robin Cook, Scottish Government Yearbook 1978, p. 105.

CHAPTER 9

Homosexual Law Reform : A Scottish 'Non-Decision'?

I. Introduction

The substance of this chapter is our third and last case study which concerns the issue of homosexual conduct. In it the divergent paths that the legislative reforms took north and south of the border will be considered. The emergence of the homosexuality question as a serious matter for debate is traced back to the 1950s, and changing public attitudes toward the subject, pressures for and against reform, and incremental policy developments are charted from that point. It will be suggested that the lack of any legislative reform of the law pertaining to homosexual relations in Scotland throughout the duration of the 1970s was tantamount to a 'non-decision' (or at the very least the subject constituted a 'non-issue').

Like the preceding study on divorce, this case is concerned with the way in which Scotland has maintained its own legal system requiring certain kinds of legislation to be framed independently. Further, it is concerned with the way a distinction in social mores still persists to a great extent north and south of the border despite the assimilation in the political realm of Scotland into the United Kingdom. However, as was noted in Chapter 1, there was an ambivalence in this assimilation whereby Scotland could be both dependent and independent within the British political system. Aspects of this duality are evident in this case study where Scotland can be identified as acting dependently in attempting to obtain a legislative reform, but independently in its administrative interpretation and implementation of the prevailing law.

In chapter 2 reference was made to Schattscheider's idea of the 'mobilisation of bias' to explain how some issues come to be organised

into politics while others are organised out. Also discussed there was Bachrach and Baratz's phenomenon of 'non-decision-making'. It was advocated that researchers should interest themselves as much in those areas where decisions are not made as where they are made. The issue of homosexual law reform in Scotland offers the chance to examine empirically some of these ideas.

It was of course the homosexuality issue, and in particular the Wolfenden Report, which sparked off the philosophical debate as to the relationship between morality and the law and in this respect the case offers further insights into the Devlin/Hart controversy on self-regarding and other regarding action outlined at the beginning of Chapter 3. In the parliamentary debates on the issue there are to be found many examples of speakers defending Devlin's 'disintegration thesis' on the grounds that to relax the law to permit homosexual relations in private amongst consenting adults would invariably lead to a moral declension which would undermine the fabric of society. Conversely, others are to be found arguing that the community's conception of morality has to be placed under careful scrutiny before an action can be ascribed as being criminal.

In Section II there is a historical perspective on the homosexuality issue which briefly sets out the 19th century origins of the law. Section III proceeds to take up the debate in the fifties, outlining the pressures for change, the appointment of the Wolfenden Committee, and the public and parliamentary reaction to its Report. Developments in the sixties are recorded in Section IV. Here the changing climate of public opinion is charted together with the various attempts at legislative reform which culminated in Leo Abse's protracted struggle in 1967 to secure the passage of the Sexual Offences Act.

In Section V the 'Scottish perspective' on the homosexuality issue is discussed. The opposition of Scots MPs in the late sixties, the opposition of the Church of Scotland and the separate legal system which allowed for the Lord Advocate's policy of 'no prosecutions' are some of the reasons expounded for Scotland's exclusion from Abse's reform Bill. The changing attitude of the Church of Scotland in 1968 is then noted. This paved the way for the emergence in 1969 of the Scottish Minorities Group and their political development and influence in the early seventies is outlined. The section continues by inquiring into the background of the Sexual Offences Consolidation measure which appeared before Parliament in 1976, and is brought to a close with a review of the attempts by Robin Cook and Lord Boothby to initiate a reform in 1977.

The 'politics' of the 1980 reform then forms the basis of Section VI. This involves a discussion of the way in which Robin Cook placed a homosexual law reform clause into the middle of the Government's Criminal Justice (Scotland) Bill and in so doing raised a storm of political controversy.

Section VII discusses the point made above that homosexual law reform in Scotland demonstrated many of the characteristics of a 'non-issue' and some reasons why this should have been so are postulated. Section VIII poses the question, 'Is this the way to reform important Scottish legislation?'. This question arose in George Younger's Commons speech and some responses to it are considered. Finally, Section IX offers some concluding remarks.

II. Historical Perspective: The 19th Century Origins of the Law.

The tenor of modern criminal law relating to homosexual conduct and practices was set in the late 19th century by the Criminal Law

Amendment Act of 1885. The original purpose of this law was 'to make further provision for the protection of women and girls, the suppression of brothels and other purposes'.¹ The Bill was introduced and passed in the House of Lords without any reference to homosexual activity. Until then the criminal law had not concerned itself with alleged indecencies between adult men committed in private, only punishing acts against public decency and conduct tending to the corruption of youth. However, in the Commons after a Second Reading without comment, it was referred to a Committee of the Whole House, whereupon a prominent backbencher of the period, Mr. Henry Labouchere, inserted into the Bill a clause which was ultimately to become Section II of the Act, creating the new offence of indency between male persons in public or *private*. Section II read:

'Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour'.²

There was no discussion except that one member asked the Speaker whether it was in order to introduce at that stage a clause dealing with a totally different class of offence to that against which the Bill was directed. The Speaker having ruled that anything could be introduced by leave of the House, the clause was agreed to without further discussion, after an unopposed amendment by Sir Henry James that the maximum punishment be increased from one year's imprisonment to two.

Of course such conduct in public had always been punishable as a criminal offence, but with the insertion of the words 'in public or private', the new clause completely altered the basis of the law.

Thus, the Labouchere amendment, introducing profound new restrictions on private personal conduct, became law without any serious consideration of its implications. The lack of parliamentary discussion has been explained by Professor Richards:

'Due to the prudery of this period homosexuality was not a topic that could be raised in polite conversation; the subject was buried beneath an oppressive veil of silence, ignorance, distaste and condemnation. It is perhaps unsurprising that no MP should be willing to challenge the Labouchere amendment and so appear to condone homosexual activities'.³

The Criminal Law Amendment Act of 1885 was applicable to Scotland as well as to England and Wales and by and large the law relating to homosexual offences was similar on both sides of the border. However, there were some important divergences. In England, at the close of the 19th Century, the Vagrancy Act of 1898 made it an offence for a male to solicit persistently in a public place for an immoral purpose. The provisions in Section I of this Act relating to importuning by male persons were designed primarily to prevent men from trying to obtain clients for prostitutes. However, they were used almost exclusively to deal with males importuning males for the purpose of homosexual relations. In Scotland, though, the corresponding provision, the Immoral Traffice (Scotland) Act of 1902 was never used in connection with males soliciting for homosexual purposes, the authorities taking the view that the Act was not intended to deal with this type of offence.

Another important difference lay in criminal procedure. Under the Scottish system criminal proceedings were in practice instituted only by the Procurator Fiscal, acting in the public interest and subject to the control of the Lord Advocate. This ensured a uniformity in the prosecution of these offences which was absent in England and Wales. Also, the fact that all but the most serious of these offences

could be dealt with summarily in the Sheriff courts, with a limited maximum penalty, made for greater uniformity of sentence than was apparent in England and Wales. One other important factor was the need in Scotland to establish corroborative evidence in order to secure a conviction against a person or persons accused of a homosexual offence. Since there were obvious difficulties in obtaining evidence to corroborate offences alleged to have taken place 'in private', prosecution rates for such offences tended to be substantially lower in Scotland than in England and Wales.

The first half of the 20th Century saw no major change in the law relating to homosexuality since the subject was still considered rather distasteful and unwholesome for public discussion. So it was not until the 1950s that the position began to change slowly as a greater frankness on sexual matters gradually became more acceptable, permitting public re-evaluation of the issue.

III. The Fifties

The early fifties saw some unexpected activity from the Church of England. Richards has recorded that in 1952 the Church of England Moral Welfare Council initiated a study into the problem of homosexuality. A report, by a group of clergy, doctors and lawyers, was published two years later in 1954. According to Richards, 'the liberal, humane tenor of this document caused much surprise',⁴ and indicated the Church's desire for further and fuller investigation of the subject. So much so that in conjunction with the Howard League for Penal Reform, the Church of England formally approached the Home Secretary to initiate an official enquiry.

His research also identifies other pressures working in the same direction such as the publicity surrounding the prosecution of certain

public figures; the pronounced variation in police policy in England on homosexuality which varied greatly between areas and in the same area at different times; and the kindling of parliamentary interest in the matter.

In the Commons in an adjournment debate in April 1954 both Desmond Donnelly (Lab. Pembroke) and Sir Robert Boothby (Cons. Aberdeenshire East) spoke strongly in favour of setting up a committee of inquiry into the law relating to homosexual conduct. Sir Robert remarked that 'on the facts as we know them, the case for such an inquiry is overwhelming'.⁵ Home Office acceptance of these demands was announced by an Under Secretary, Sir Hugh Lucas-Tooth, who indicated that the Home Secretary, in conjunction with the Secretary of State for Scotland, had decided to appoint a committee to examine the question.

In the following month the issue came up for debate in the House of Lords where the tone of debate was altogether different. A speech from Earl Winterton introduced the debate. He considered it necessary 'to offer some reason and justification ... for bringing forward this nauseating subject'.⁶ The propaganda which had brought the issue to the fore, he suggested, had put the matter into a wrong perspective. He referred to the 'filthy, disgusting, unnatural vice of homosexuality',⁷ and told their Lordships that in his younger days this type of thing just was not tolerated:

'In my opinion, there has been a moral declension ... I am convinced that the majority of British people agree with me that few things lower the prestige, weaken the moral fibre and injure the physique of a nation more than tolerated and widespread homosexuality'.⁸

This provides a good example of the 'disintegration thesis' referred to in Chapter 3.

A similar tack was adopted by the Lords Vansittart and Ammon.

Vansittart warned:

'I have an uneasy feeling that the increase in this vice during the past half century will not be checked without some balanced revival of the reprobation with which it was once regarded'.⁹

While Ammon argued:

'... mere punishment will not provide a solution. I believe it can be provided only by a rise in the spiritual and moral nature of the people as a whole, and we can bring about such a rise only by showing our abhorrence and detestation of these filthy habits'.¹⁰

However, a different view was taken by the Lords Jowitt, Ritchie of Dundee and Brabazon of Tara. Jowitt pointed to the mistake of trying to make the area covered by criminal law co-extensive with the area covered by moral law, while Ritchie of Dundee commented upon the need to consider changing public attitudes to the issue, which he now felt were much more tolerant. Brabazon of Tara thought the issue to be more clinical than criminal and therefore the need was to examine the complicated question of breeding, environment, education and other factors of this type. And Lord Chorley felt that too much of the discussion had taken place 'on an emotional rather than on a scientific level'.¹¹

A Committee to enquire into homosexual offences and prostitution was appointed later that summer in August 1954 under the chairmanship of Sir John Wolfenden. The Committee members were drawn from both Houses of Parliament, both main political parties, medicine, the legal profession and the main religious denominations in England and Scotland. Its terms of reference were clear and straightforward:

'To consider (a) the law and practice relating to homosexual offences and the treatment of persons convicted of such offences by the courts; and
(b) the law and practice relating to offences

against the criminal law in connection with prostitution and solicitation for immoral purposes'.¹²

The Committee took evidence from a wide variety of organisations, government departments and individual witnesses. The evidence was presented in confidence although some institutions did subsequently publish their submissions. Richards' research into this area though, has indicated that 'the balance of influence and argument favoured change'.¹³ He has singled out the Church of England Moral Welfare Council's evidence as 'by far the most influential submission to the Committee',¹⁴ discussing as it did the problems of homosexuals and homosexuality in compassionate terms.

The approach of Wolfenden to the problem was set out early in the Report. The Committee did not consider it appropriate to enter into matters of private moral conduct except in so far as they directly affected the public good. The Report explained:

'Our primary duty has been to consider the extent to which homosexual behaviour and female prostitution should come under the condemnation of the criminal law'.¹⁵

In the field in question the function of the criminal law, as the Committee saw it, was,

'to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced or in a state of special physical, official or economic dependence'.¹⁶

It was not, they argued, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than was necessary to carry out those purposes outlined.

Against this approach the Committee then sought to establish, within the limitations of its remit, the nature of homosexuality. The Report stressed the important difference between 'homosexuality' and 'homosexual offences'. Utilising the dictionary definition of 'homosexuality' as a sexual propensity for persons of one's own sex, the Report argued that homosexuality was a state or condition, and as such did not, and could not, come within the purview of the criminal law. There was nothing criminal in being homosexual. That established, it then remained for the Committee to decide what types of homosexual activity could reasonably be deemed to constitute offences.

The Committee, in reviewing the existing provisions of the law in relation to homosexual behaviour between male persons found that they were in complete agreement with the great majority of provisions. There were two categories of offence they wished to see retained. The Committee believed that it was part of the function of the law to safeguard those who needed protection by reason of their youth or some mental defect and therefore they recommended the retention of offences committed by adults with juveniles. Secondly, since it was part of the function of the law to preserve public order and decency, the Committee held that when homosexual behaviour between males took place in public it should continue to be dealt with by the criminal law. However, there was a third class of offence to which the Committee 'had to give long and careful consideration', that of homosexual acts committed between adults in private.

On the basis of the considerations advanced concerning the province of the law and its sanctions, and how far it properly applied to the sexual behaviour of the individual citizen, the Committee reached the conclusion that legislation which covered acts in the

third category mentioned, went beyond the proper sphere of the law's concern. The Report stated:

'We do not think that it is proper for the law to concern itself with what a man does in private unless it can be shown to be so contrary to the public good that the law ought to intervene in its function as the guardian of that public good'.¹⁷

While the Committee recognised the weight of arguments which expressed genuine concern that homosexual acts, even in private, threatened the public good, they were not persuaded that they warranted retaining the existing law for this third category and they presented a number of counter-arguments to that effect. However, the counter-argument which the Committee thought to be decisive was 'the importance which society and the law ought to give individual freedom of choice and action in matters of private morality'.¹⁸ They accordingly recommended that homosexual behaviour between consenting adults in private should no longer be a criminal offence.

The Wolfenden Report also contained a substantial amount of information which had an important educational impact on public opinion. While the available statistical information was less than adequate it nevertheless highlighted some dramatic differences between the rates of prosecution of homosexual offences in England and in Scotland. In England and Wales, during the three year period between 1953 and 1956, 480 men aged 21 or over were convicted of offences committed in private with consenting partners also aged 21 or over. Of these, however, 121 were also convicted of offences in public places, while another 59 were convicted of offences with juveniles. In Scotland, during the same period, 9 men over 21 were convicted of offences committed in private with consenting adults. Of these, one admitted offences in a public place and one admitted offences with a juvenile. Thus 300 men in England and Wales and 7 in Scotland, guilty as far as was known

only of offences committed in private with consenting adult partners were convicted by the courts during this period.

The Report noted that the number of men prosecuted in Scotland for homosexual offences committed in private with consenting adult partners was 'infinitesimal' in comparison to the number so prosecuted in England and Wales. It continued:

'From our examination of Scottish witnesses, including the police and legal and medical witnesses, we are led to believe that homosexuality and homosexual behaviour are about as prevalent in different parts of Scotland as in comparable districts in the rest of Great Britain, and it seems to us that the disparity in the number of prosecutions is due to some fundamental differences in criminal procedure'.¹⁹

These differences in criminal procedure have been touched upon earlier in a historical context. The Report established the same essential areas of divergence. Firstly, it was the duty of the Procurator-Fiscal to initiate and conduct proceedings in the Sheriff Court in any case in which he considered the circumstances warranted such action, but he was not bound to institute proceedings in every case brought to his notice (although he was answerable to the Lord Advocate). The overriding consideration was the public interest and since no obvious public interest was discernible in the prosecution of 'stale offences', proceedings in such cases were rarely instituted in Scotland. Police did not therefore waste time in pursuing enquiries into old offences.

Another factor influencing the intensity of police enquiry was the standard of proof required by law which was higher in Scotland than it was in England and Wales. By the law of Scotland, no person could be convicted of any homosexual offence unless there was evidence of at least two witnesses implicating the person with the commission of the offence with which he was charged, or corroboration of one

witness from such proved facts and circumstances as would lead clearly to a conclusion of guilt. While a written statement by the offender admitting his offences afforded the necessary corroboration, as in England and Wales, the rules relating to the admissability of statements tended to be more strictly interpreted in Scotland than they were south of the border.

These requirements and differences, of course, operated over the whole field of criminal law and were not particular to homosexual offences. Yet it can be seen that the practical consequences of their operation in the sphere of homosexual offences could produce pronounced differences in rates of prosecution. The Wolfenden Report though, had the slightly misleading tendency to compare these figures for rates of prosecution between Scotland and England in absolute terms rather than proportionally. However, the fundamental problem lay in the overall statistical information available to the Committee. The figures obtained were extracted largely from criminal and medical records and therefore represented only detected offences or known cases. The Report conceded:

'it is impossible to determine what proportion of the persons concerned these minorities represent; still less on this evidence, what proportion of the total population falls within the description homosexual'.²⁰

The Wolfenden Report was published in September 1957 but it was not unanimous in its main recommendation that homosexual behaviour between consenting adults over 21 in private should no longer be a criminal offence. Reservations were expressed by one Committee member, Mr. James Adair, a Procurator-Fiscal from Scotland. The essence of his reservation was that;

'the removal of the present prohibition from the criminal code will be regarded as condoning or licensing licentiousness, and will open up for such people a new field of permitted conduct with unwholesome and distasteful implications'.²¹

Further,

'the fact that activities inherently hurtful to community life are carried out clandestinely and in private does not adequately justify the removal of such conduct from the criminal code'.²²

Public reaction to the Report seems to have been divided along much the same lines. Richards' research into the press coverage has indicated that the national dailies which supported reform included 'The Times', 'The Daily Telegraph', 'The Guardian' and 'The Mirror', while 'The Daily Mail' and 'The Daily Express' and most of the provincial press shared the doubts expressed by Mr. James Adair. He observed, 'informed and metropolitan opinion appeared to be ahead of the rest of the country'.²³

Religious opinion was similarly divided. The Church of England hierarchy generally approved the Wolfenden proposals but support from the lower echelons was not as forthcoming, and although the Church Assembly approved the cause of reform it was only by a slim majority of 155 to 138. The Methodists also supported reform but contained a dissentient minority. The Church of Scotland, however, came out against any change in the law.

The Report of the Committee on Church and Nation to the 1958 General Assembly noted that Wolfenden was 'an event of urgent importance to the Church of Scotland'.²⁴ Although there was general agreement within the Church that there were areas of personal conduct into which the criminal law should not enter, that was not to say that the criminal law should have no concern with ethical standards. The division of opinion between those who accepted the reasoning and conclusions of the majority Report and those who shared the misgivings of Mr. James Adair was repeated within the Church and Nation Committee itself. While a special sub-committee on the issue had come to a

different conclusion, the majority of the Church and Nation Committee did not feel able to recommend acceptance of the proposed changes in the Wolfenden Report:

'In a Christian country, it seems to us, the law should reflect as far as possible the generally accepted standards and principles of Christian ethics; and in the past such principles have been the basis of many legal enactments. In our opinion there are certain forms of behaviour that are so contrary to Christian moral principles, and so repugnant to the general consensus of opinion throughout the nation that, even if private and personal, they should be regarded as both morally wrong and legally punishable Homosexual offences seem to us to fall within this category'.²⁵

The Church of Scotland then, adopted the same line as James Adair, arguing that such a reform would suggest that homosexual conduct was less morally reprehensible than was formerly thought. Thus,

'The General Assembly would regard such legal changes as inopportune, as liable to serious misunderstanding and misinterpretation, and as calculated to increase rather than diminish this grave evil'.²⁶

More favourable reaction came from some of the secular organisations involved such as the Howard League for Penal Reform and the Institute of Social Psychiatry, who both urged adoption of the Wolfenden proposals. The first specific pressure group on the issue was also formed post-Wolfenden with the foundation of the Homosexual Law Reform Society in 1958. It would seem though, from information again provided by Richards' research, that mass opinion, as reflected by opinion polls in the press, was only between 40 to 50% in favour of reform.

The first parliamentary debate on the Wolfenden Report came only a few months after it was published, in the December of 1957 in the House of Lords. Again in keeping with the trend of that period the balance of opinion amongst their Lordships was split evenly down the

middle. Early speakers in the debate like Lords Pakenham and Moynihan, spoke in favour of the proposals in respect of consenting adults in private, backed by the Archbishop of Canterbury who, drawing attention to the differences between the sphere of crime and the sphere of sin, argued that it was,

'of real importance for the national well-being that the difference between the two should be clearly understood, both as to the moral grounds they respectively cover and as to the sanctions on which the two spheres respectively rest'.²⁷

The Marquess of Lothian, who had himself sat on the Committee urged that if a change in the law was clearly and logically put before the British public, they would see it as a just law, not a weaker law. However, the Lord Bishop of Rochester did not agree:

'There is no more baneful or contagious an influence in the world than that which emanates from homosexual practice.... Protection is needed here, and homosexuals should be kept on a leash to prevent them from practising homosexual vice'.²⁸

Similarly, the Lord Bishop of Carlisle contended that the conclusion which the general public would draw from the abolition of the law was that the State was condoning what previously it had condemned. Lord Denning also felt that the law 'should condemn this evil for the evil it is, but the judges should be discreet in their punishment of it'.²⁹ He suggested that England should adopt a system (similar to Scotland) where the prosecution should consult the Director of Public Prosecutions in cases of persons over 21 in order to ensure uniformity.

The Government's position was given by the Lord Chancellor, Viscount Kilmuir, who indicated that they were taking careful account of public opinion.

'There are cases ... when it may well be the duty of a Government to lead rather than to follow public opinion, but in a matter of this kind the general sense of community, particularly as expressed in Statutes which

have been left undisturbed for long periods, is an important feature; and the community is entitled to its view as to what affects society as a whole. Her Majesty's Government do not think that the general sense of the community is with the Committee in this recommendation, and therefore they think that the problem requires further study and consideration. Certainly there can be no prospect of early legislation on this subject'.³⁰

It was not until a year later, in late November 1958, that the Commons eventually found time to debate the Report. Even after the lapse of a year for further reflection the pattern of divided opinion still prevailed. Speaking in favour of the Wolfenden recommendation Anthony Greenwood (Lab. Rossendale) expressed sympathy for the homosexual,

'Life is harsh enough for these people without society adding to their burden. The fact that the law is largely unenforced, and, indeed, largely unenforceable, is certainly no reason for retaining it.... It seems to me that one is as likely to cure a homosexual of his perversion by sending him to prison as one is likely to cure a drunkard by incarcerating him in a brewery'.³¹

Sir Hugh Linstead (Cons. Putney) who had sat on the Wolfenden Committee, appealed that 'what consenting adults do in private can be morally regarded as their own affair, a matter for their own conscience'.³²

Also, Mr. Douglas Jay (Lab. Battersea North) felt the existing law to be obsolete and unjust because it infringed a basic principle of personal freedom.

Speaking against the recommendation, Mr. F. J. Bellenger (Lab. Bassetlaw), wanted to strip away some of the 'false sentimentality' and 'false romanticism' from homosexuality. He believed that 'any arguments which can be advanced on grounds of logic are overwhelmed by moral considerations and the public interest'.³³ Mr. James Dance (Cons. Bromsgrove) chose to beat his breast in a speech on law and order:

'There can be no question that this practice is a social evil and that it undermines the morals of the country',³⁴

he warned. Mr. Dance also felt obliged to offer the following suggestion:

'I do not think it would necessarily work now, but when a cure is available I suggest that in the same way as one sees those venereal disease posters in male public urinals, similar notices should be put up advising homosexuals that there is a cure and mentioning the nearest clinic where they can get that cure'.³⁵

With insights like this Mr. Dance's grasp of reality was seriously brought into question. Mr. Cyril Black (Cons. Wimbledon), however, preferred to use historical precedents upon which to base his opposition:

'These unnatural practices, if persisted in, spell death to the souls of those who indulge in them. Great nations have fallen and empires destroyed because corruption became widespread and socially acceptable'.³⁶

The arguments, then, had not changed in a year nor had the Government's position. R. A. Butler, the Home Secretary, indicated:

'...what is clear, after taking this time to think it over and to receive all the impressions and consider the perplexities of this problem, is that there is at present a very large section of the population who strongly repudiate homosexual conduct and whose moral sense would be offended by an alteration of the law which would seem to imply approval or tolerance of what they regard as a great social evil. Therefore, the considerations I have indicated satisfy the Government that they would not be justified at present on the basis of opinions expressed so far, in proposing legislation to carry out the recommendations of the Committee'.³⁷

IV. The Sixties.

The first vote on the issue came from a Private Member's motion introduced by Kenneth Robinson (Lab. St. Pancras) in June 1960 calling on the Government to take early action to implement the Wolfenden

recommendations on homosexuality. Support for the motion came from a number of prominent Labour members such as Eirene White (Lab. East Flint), Douglas Jay, Anthony Greenwood and Roy Jenkins (Lab. Birmingham Stechford). Eirene White made the astute observation that,

'in considering the subject of male homosexuality a number of men consciously or subconsciously are moved to vehement condemnation by some feeling that they have to assert their own virility in the process'.³⁸

A typical example was provided by Mr. Godfrey Lagden (Cons. Hornchurch) who was of the opinion that 'in the general run the homosexual is a dirty-minded danger to the virile manhood of this country'.³⁹ The Government, however, remained unmoved and continued its policy of neutral inaction on the grounds that very great differences of opinion still persisted. These differences of opinion were manifest in the division which was hostile to the motion by 213 votes to 99.

Leo Abse (Lab. Pontypool) has commented that whereas the resistances which occurred in the field of divorce reform came largely from pressures on Members from outside the Commons, the resistances against homosexual reform arose largely from the imperfectly resolved homosexual drives of some of the Members themselves. He has analysed the mood of the 1959-64 Parliament thus:

'With homosexual impulses inadequately desexualised and contained, any mention of a change of law meets resistance. There was too much uncertainty among too many in the Conservative Parliament. Permitting more freedom to homosexuals was interpreted as a personal threat: unknowingly they equated relaxation of the law with the relaxation of the control which they were anxious at all costs to preserve over their own repudiated feelings'.⁴⁰

Against this background Abse did try to put through a modest reform in the 1959-64 Parliament which would have given effect to some of the subsidiary recommendations of the Wolfenden Report but not the main one concerning consenting adults in private. The Bill

was talked out but it served two main purposes. Firstly, it was instrumental in getting the Director of Public Prosecutions to ask chief constables to consult him before prosecuting homosexual acts committed by adults in private. Secondly, it helped to keep the issue alive. Abse has indicated that 'the more the repressed material was levered into public consciousness, the more the taboo on discussion was weakened....(A)fter the return in 1964 of a Labour Government ...homosexuality needed no longer to be spoken about in sanctimonious whispers'.⁴¹

Peter Richards has made a similar observation on changing attitudes to the issue in the early sixties. He has written:

'It is impossible to measure precisely the effect of an educational campaign but the public attitude towards homosexuality continued to change slowly. No longer was it merely a subject for automatic condemnation by judges and moralists or for sniggering jokes about "queers". Increasingly it became a fit subject for serious conversation...'.⁴²

This change was evident in a debate initiated by the Earl of Arran in the House of Lords in May 1965. The tenor of the debate had altered considerably with only two or three out of the score or so Lords who joined in the debate opposing law reform. Lord Jessel was moved to comment, 'the reason for this change in atmosphere is, I am sure, based on an increased knowledge of the subject'.⁴³

Those who spoke in favour of altering the law in respect of homosexual acts between consenting adults in private based their case 'on reason and justice, and on considerations of the good of the community'.⁴⁴ Accepting the law as it stood involved the unjust persecution of a minority. Parliament could not go on waiting for a public opinion which could never be defined in hard and concrete terms. The time had come, it was claimed, for legislation to move into line with the weight of informed opinion. Administrative tinkering with the law was not an

answer. Lord Stonham -

'If the law is to be changed, it must be changed by Parliament. Neither the Home Secretary, nor the Attorney-General, nor the Director of Public Prosecutions, nor chief constables, nor anyone else, can properly implement the Wolfenden recommendations by administrative action or inaction'.⁴⁵

Thus, if a change in the law was to be made it must be by a Private Member's Bill with the decision left to a free vote of Parliament.

The case against reform was put by Lord Rowallan, supported from the sidelines by Lord Hobson. Rowallan's concern was the effect any such relaxation in the law would have on the youth of the country and he deplored 'any attempt to legitimise in any way the practices which we have tried to bring up our young fellows to abhor'.⁴⁶

The weight of opinion in this debate was overwhelmingly in favour of a reform in the law. However, no division could be taken because of the nature of the motion, which was a Motion for Papers, a procedural technique for initiating policy discussion. Nevertheless, encouraged by the favourable response, the Earl of Arran introduced a Private Member's Bill later in the same month which managed to obtain a Second Reading by 94 votes to 49. Debate on this occasion was not so one-sided and Arran had to work hard to smooth troubled waters when Viscount Montgomery took him to task over the legal position in the Armed Forces. In spite of some well entrenched opposition Arran's Bill did manage to complete its passage through the Upper House and was passed to the Commons although not until late October, by which time the end of the parliamentary session was imminent and the Bill was lost. The exercise though, had served to demonstrate that the balance of informed opinion within the Lords had swung in favour of reform.

Meanwhile, in the Commons, Leo Abse had taken the opportunity of introducing a parallel Bill under the Ten-Minute Rule and although it was defeated by 178 votes to 159, it too marked a watershed. Abse was later to reflect,

'the majority against the reformers was wafer-thin, and I knew that the bizarre and unpredictable events of that afternoon, well reported to a bemused nation the next day, meant that never again would homosexual law reformers be on the defensive in the Commons'.⁴⁷

The 1965-66 Parliamentary Session brought with it a high place in the Private Members' Ballot for Humphrey Berkeley (Cons. Lancaster), a Member favourably disposed to homosexual law reform, and his Bill came before the House for a Second Reading in early February 1966. In a courageous and persuasive introductory speech Mr. Berkeley argued intelligently as to why the law needed to be changed. The law, he said, was not being enforced and that made for bad law. If the law was bad it should be changed. He was supported by Mr. G. R. Strauss (Lab. Vauxhall) who argued that in light of the misery and degradation which homosexuals were forced to undergo, with the constant threat of blackmail and fear of prison it was up to those opposed to change to justify their view. Other supporters included Leo Abse and the Home Secretary, Roy Jenkins, who believed that public opinion was now sufficiently educated to accept a reform.

Sir Cyril Black however, felt that a difficult problem would not be helped any by 'the State withdrawing its existing disapprobation from acts which most people regard as loathsome and debasing'.⁴⁸ This sentiment was echoed by Sir Cyril Osborne (Cons. Louth), a self-styled Victorian, who commented:

'I am rather tired of democracy being made safe for the pimps, the prostitutes, the spivs, the pansies and now, the queers. It is high time

that we ordinary squares had some public attention and our point of view listened to'.⁴⁹

He warned that the Bill would open the flood gates, and all but accused the sponsors of the Bill of sharp practice, because the Bill had been brought forward on a Friday afternoon when none of the Scottish MPs were present to oppose it. A disgruntled Sir Cyril remarked,

'It seems to me that to bring this important social measure before the House on a Friday, in the full knowledge that the good Scottish Socialist Calvinistic MPs are away, is cheating'.⁵⁰

The Bill received a Second Reading by 164 votes to 107, but it was to make no further progress since a General Election was announced and Parliament dissolved. The division showed a quite substantial movement of opinion as compared with Abse's earlier Bill. Professor Richards' research into the voting pattern has explained this difference as being due to the change in attendance at the two divisions, rather than individual Members changing their minds.

With a new Parliament reassembled, Arran once again started a Bill in the Lords. This managed to complete its passage through the Lords by mid-June, at just about the time Abse gave notice of his intention to introduce a Bill in the Commons. He was later to reveal how events were to unfold:

'Immediately, on his own initiative, Roy Jenkins, then the Home Secretary, sent for me and assured me that if I could gain a decisive vote when, under the Ten-Minute-rule procedure, I was to ask leave to introduce the Bill, he would insist at Cabinet level for government time to be given to me. He was to prove as good as his word, and my friendship with the Chief Whip, John Silkin, was to guarantee that Jenkins' private undertaking to me was able to be fulfilled'.⁵¹

Abse duly introduced his Bill and with the help of the changed composition of the House managed to win convincingly by 244 votes to 100. He continued:

'The Government stance had to be one of neutrality: but Silkin's assurance to me that, whatever procedural obstruction I was to meet, provided I could maintain a decisive majority, he, by hook or by crook, would find the parliamentary time, was to prove decisive'.⁵²

The Bill eventually came before the House for a Second Reading in late December just before the Christmas recess. Introducing it, Abse criticised the existing law for giving homosexuals a brutal choice, offering them either celibacy or criminality with nothing in between. He pleaded to those Members who were 'blessed with the emotional security of a heterosexual life'⁵³ to show compassion to those whose terrible fate it was to be homosexual. This line was part of a subtle tactical ploy of Abse who realised that in order to succeed, the argument would have to be presented in a form which violated his own private beliefs, which were based on Freud's idea of the universality of bisexuality. He was to remark,

'...to have pleaded Freud would have alarmed too many in the House, insufficiently secure in their own heterosexuality to acknowledge their homosexual dispositions.... But, of course, it was only by insisting that compassion was needed for a totally separate group, quite unlike the absolutely normal male males of the Commons, could I allay the anxiety and resistances that otherwise would have been provoked. Homosexuals had to be placed at a distance, suffering a distinctive and terrible fate so different from that enjoyed by Honourable Members blessed with normality, children and the joys of a secure family life. Because of their wealthy endowment, they could surely afford charity'.⁵⁴

While many Members were persuaded by this theme, a number still harboured doubts. Strong reservations were expressed by some over the way in which the proposed reform would operate in relation to the Merchant Navy. Abse hinted at the possibility of a compromise formula being found if the Bill was allowed to pass to its Committee Stage. He was sure that a detailed solution could be worked out there.

This hint was enough to reassure the waverers, but more importantly it was part of his tactical plan to facilitate the passage of the Bill through Committee.

The reservations of Sir Stephen McAdden (Cons. Southend East) concerned procedure. He took exception to the Government allocating time to allow the issue to be debated and was most anxious that the House should be clear on what was happening in the name of Parliamentary democracy.

'We have before us what is alleged to be a Private Member's Bill, but it is a Bill to which quite extraordinary privileges have been accorded'.⁵⁵

A procedural motion had in fact been passed to allow the Second Reading debate to continue beyond 10 p.m. In this light he had 'no respect whatever for people who skulk on the Government Front Bench, unable to come forward openly and say this is a Measure which they support, but hoping that Private Members will be able to sneak Measures through the House...'.⁵⁶

The Home Secretary, Roy Jenkins, describing McAdden's contribution as a 'somewhat extraordinary effusion', replied in a predictable manner on behalf of the Government. He indicated that the fact that the Government had provided time did not mean that the attitude collectively of the Government was anything other than that of neutrality. It was felt that since the principle of the Bill had been approved by the Commons and the Lords on previous occasions, 'it was only right to give the House the opportunity to accept or reject the change in the law proposed'. He continued;

'Had we not taken this course, we should have found ourselves faced with the anomaly that the sanction of the criminal law continued to apply to acts which Parliament no longer considered to be criminal, and that solely because of the hazards of the Private Member's Bill procedure the law could not

be changed. It would clearly have been an unsatisfactory position, in which the police authorities and the courts would have been required to go on applying a law which had twice been pronounced, by decisive majorities in both Houses, itself to be unsatisfactory'.⁵⁷

Having carried the Second Reading, Abse proceeded to put his tactical plan for the Committee Stage into operation. With the collusion of John Silkin, he was able to follow up so quickly with a Committee Stage that opponents to reform were unprepared with their amendments which would have prolonged the debate. Further, they erroneously assumed that the seafaring issues would prove to be protracted and that time would later become available for them to debate their intended amendments. However, in the interim between Second Reading and Committee, Abse had reached a compromise solution with members of the National Maritime Board concerning the position of the Merchant Navy. The agreed clause, which in limited circumstances and with limited penalties, retained homosexuality at sea as an offence, was put through the Committee in a matter of half an hour. Since the remainder of the amendments were of a minor nature, the Bill proceeded through its entire Committee Stage at a single sitting of two hours. Abse was to remark of this:

'My tactics, and this particular ruse, enraged my frustrated opponents whose full fury was to be flung at me, when the Bill reached its final report stage on the floor of the House'.⁵⁸

When the Bill did appear on the floor of the House on the 23rd June a long series of wrecking amendments awaited it, tabled by Sir Cyril Osborne, Mr. Ray Mawby (Cons. Totnes) and others. The Bill's opponents embarked upon a series of long speeches designed to talk the Bill out and they were successful in so far as the Bill had not completed its Report Stage at the close of the sitting. Leo Abse was reported in 'The Times' the following day as saying that it was

sad that 'a small cabal can use the procedures of the House to thwart the clear intentions of the overwhelming majority'.⁵⁹ If the Bill was not now to falter, more time was required. This was forthcoming by way of a Government allocated all night sitting on the 3rd July. However, in order to defeat the inevitable filibuster, Abse would have to keep the strength of his support at a minimum of 100 Members throughout the night so that he might move and successfully enforce a closure motion on each amendment, thus curtailing unnecessary debate. This he managed to achieve on no fewer than nine divisions throughout the course of the night, although on one or two occasions he was perilously close to falling short. He later remarked:

'It was not the arguments on each occasion which I had to counteract that caused me any difficulties: it was the knowledge that if one or two bored MPs went home I was totally undone and the Bill would be killed'.⁶⁰

With the last remaining hurdle cleared the Bill progressed to the Lords to complete its passage. Being the third Bill of its kind in as many years to appear in the Upper House their Lordships passed it without undue controversy and the Bill became the Sexual Offences Act on the 27th July 1967.

Peter Richards has argued that there were four main factors which eventually led to reform: the practical, the psychological, the moral and the political. To this can be added a fifth: the energy and astuteness of a number of key individuals.

On practical grounds, the existing law was both unenforced and unenforceable. Criminal statistics in England illustrated that where prosecutions were being brought it was in an arbitrary and erratic manner, varying not only between different areas, but also at different periods within the same area. Psychologically, evidence suggested that homosexuals were not responsible for their own condition

and therefore punitive measures against them were inappropriate. Morally, the argument was that private conduct should be a matter of individual conscience provided it did not harm society. The invasion of privacy to secure a prosecution against consenting adults was a denial of the individual's right to determine his own moral standards. Lastly, in the political arena there was a qualitative difference in the arguments of the reformers and the retentionists. The retentionist case was based on fear: fear that a more liberal law would 'open the flood gates' by appearing to approve, or at least condone, homosexual conduct. As Richards stated,

'...the retentionists were forced back into a defensive posture and invoked fear of freedom - a puritan spectre of society consumed by evil once legal restraints were withdrawn'.⁶¹

Consequently, much of their case was eroded when the Church of England took the view that although sinful, homosexual relations between consenting adults in private should not be criminal. This, in combination with the reformers' plea for Christian compassion, along with their tactic of keeping the debate as rational and moderate as possible in order to avoid emotion and prejudice, effectively defeated the retentionist argument.

That the reformers managed to get their case across in a rational and unemotive manner was due in no small part to the industry, intelligence and courage of the Bill's sponsors. Particularly courageous was Humphrey Berkeley who was a young bachelor representing a marginal constituency. For an MP to associate himself with homosexual law reform was to invite electoral trouble, and Berkeley paid the price. In the March election of 1966 he lost his seat. While it is not possible to say that the single issue of homosexual reform cost him the seat, there can be no doubt that it did cost him a substantial number of his constituents' votes.

Although unconcerned about votes, the Earl of Arran was also subjected to some highly unpleasant personal vilefication. It was thanks largely to his industry in the Lords in keeping the issue alive and in the minds of Parliamentarians that reform was eventually achieved. Twice he skilfully steered Bills through the Upper House to demonstrate the swing in informed opinion on the issue. Arran had had no history of reforming zeal but his tireless efforts on this matter were prompted by the fact that his older brother had been homosexual and had received psychiatric aid over a period of years. He died tragically only a few days after becoming Earl, the title to which Arran succeeded. Yet whatever the underlying motives for his actions, there is no underestimating the importance of his influence in promoting and achieving reform.

The central figure in the issue though, was undoubtedly Leo Abse. His determination, political astuteness and acerbic wit were at the very heart of the reform as he single handedly took on all-comers. He has described the tasks of a Private Member in such a situation thus:

'A Private Member has to coax and cajole his Bill through its committee and report stages; lacking official Party support and no enforceable whipping, he is entirely dependent on the goodwill and the relationships he is able to establish with his colleagues if the Bill is to be completed in the limited Private Members' time available. He must be ready to yield on inessentials and be firm on points of substance, but he must allow his opponents to believe they are winning a war when they have gained a little ground in a minor skirmish. He must never fall into the hands of a partisan lobby and must maintain a constant and sensitive, but non-manipulative relationship with all the press and TV communicators. He must maintain sufficient passion to mobilize his supporters, and constantly, at least formally, consult them while presenting a front of reasonableness to doubters and opponents so as never provocatively and unreasonably to estrange them'.⁶²

Abse, in the course of homosexual law reform, accomplished all of this if not more. Admittedly he had the ear of some very powerful figures in the Labour Administration of the period, which, it should be noted, tended to be favourably disposed towards assisting the promotion of important social reforms generally. While this must be borne in mind it should not detract from Abse's parliamentary skills once time was made available. He always appeared to be one-step ahead of his opponents and managed consistently to out-manoeuvre them, the coup coming when the Bill went through Committee in just two hours. Even at the very last hurdle he was able to mobilise sufficient support to see him through the strains of an all-night sitting. While Abse's modest nature would make him play down his role in homosexual law reform, his contribution was, nevertheless, of monumental importance.

V. The Scottish Perspective.

Scotland (and Northern Ireland) had been omitted from the 1967 Sexual Offences Act. Why? One utterance already noted gives some indication. Sir Cyril Black, speaking on the Berkeley Bill, made reference to the 'good Scottish Socialist Calvinistic MPs'. It will be recalled that Sir Cyril was suggesting that an attempt was being made to put the Bill through while Scottish MPs, who could be relied upon to oppose it, were away in their constituencies. So the opinion of the majority of Scottish MPs may well have been an important factor. There is little doubt that Abse omitted Scotland because he thought there would be enough trouble getting the Bill through without adding to his problems by incurring the wrath of Scottish Members. Speaking in the 1980 debate on homosexual law reform in Scotland he stated quite plainly his reason for the omission:

'I had enough trouble on my hands without taking on the Scots'.⁶³ Abse's penchant for psychoanalysis tended to make him rather wary of the power and influence of the Calvinist ethos on Scottish Members. Such was his wariness in fact, that he has suggested, tongue in cheek, 'even the Jews turn Calvinist up there in Scotland'.⁶⁴ Understandably then, he was reluctant to add Scotland. The same would seem to have applied to Humphry Berkeley. David Steel (Lib. Roxburgh, Selkirk and Peebles) recollecting a conversation, indicated that Berkeley felt that since his Bill was being discussed on a Friday, to have included Scotland in it would have prompted Scottish Members to stay behind and vote against it. Thus, Sir Cyril was probably not far off the mark in his analysis.

Another important factor was the attitude of the Church of Scotland throughout the best part of the 1960s. It will be recalled that in the late fifties when the Wolfenden Report was published, all the major Churches in the United Kingdom accepted its recommendations with the exception of the Church of Scotland. The deliverance of the General Assembly in 1958 against homosexual law reform remained the Church's policy until 1968, although the issue was reconsidered in both 1966 and 1967.

In its report to the General Assembly of 1966, the Committee on Temperance and Moral Welfare stated that;

'in view of the fact that the attitude of the Church of Scotland in this subject has differed from that of most other Churches in Britain, and of proposed legislation currently before Parliament, it was thought right that a Working Party should again consider the question. It was agreed, however, that because of a difference of law and police procedure in Scotland from those obtaining in England, adequate protection for the individual already existed here and no amending legislation was required'.⁶⁵

The view was therefore adopted that as far as Scotland was concerned the recommendations of the Wolfenden Report had to all intents and purposes been put into effect by the simple expedient of not proceeding against adults who consented to homosexual acts in private. Even so, the Committee continued to keep the matter under consideration.

In 1967 the Working Party reassessed its acceptance of the status quo:

'It agreed that the position in Scotland is satisfactory in so far as the fact that the strict law, with regard to private homosexual acts between consenting adults, is no longer being enforced. Since this is so and for the reasons later to be adduced, it would be better were the law now to be amended in order to accord with modern practice'.⁶⁶

The reasons referred to were concerned primarily with the pastoral care of homosexuals. If homosexual acts between consenting adults in private were no longer a crime, thus making the law in fact what it already was in practice, it would be easier for homosexuals to approach the Church and for the Church to offer them redemption.

This report, however, was rejected in no uncertain terms by the General Assembly in May 1967. The deliverance stated:

'The General Assembly, being persuaded that there is a need for a clear statement of Christian principles in face of this grave and growing evil, resolve as follows:
1. The General Assembly deplore the prevalence of homosexual practices as a source of uncleanness and deterioration in human character, and of weakness and decadence in the Nation's life'.⁶⁷

In the debate on the report, the Rev. Dr. William MacNicol of Longforgan, one of the Church's elder statesmen, said that no matter what the Wolfenden Report recommended, or the law of the land might be, or other churches might decide, the Church of Scotland should make it clear where it stood on the issue of homosexuality, and that was for no covering up of 'filthy and degrading practices' with polite names. Indulgence in them was a 'grave and growing evil, which had incurred

God's wrath in the past and would do so again if they were persisted in'.⁶⁸

Therefore, not only was the Church of Scotland hostile to homosexual law reform throughout the better part of the sixties, it publicly reasserted its opposition, despite the Moral Welfare Committee recommendations to the contrary, at the very time the Abse Bill was progressing through Parliament. Thus, the attitude and influence of the Church of Scotland must be viewed as an important factor contributing to Scotland's omission from the provisions of the Sexual Offences Act 1967. Nor was the attitude of the Roman Catholic Church in Scotland much different. Homosexual acts, it said, were condemned by Scripture and could not in any circumstances receive approval. In the seventies, however, the Catholic Church, while not condoning homosexual acts, became more sympathetic to the problems of homosexuals.

Speaking in the 1967 reform debate in the Lords, Lord Balerno made the following astute observation about the Scottish perspective:

'There was a minority for the Bill in the Church of Scotland, as there are minorities against the Bill in other Churches. Whether that ... indicates a difference of Presbyterian ethics, ... whether it is a different system of Church Government, or whether it is for some other reason than a purely religious one, it is very difficult to say. It may be that in Scotland we are not yet ready for the more permissive society that is overcoming England and encroaching into Scotland. It certainly is the case, I think, ... that in this respect we have a more liberal legal system. It is less hide-bound and more easily adjusted to the circumstances of the period than the system which obtains in England. On the other hand, my Lords, it may be merely that we in Scotland suffer from an inferiority complex by being the junior Kingdom'.⁶⁹

This difference in the legal system, highlighted here by Balerno, would appear to be another factor accounting for the measure not being extended to Scotland. Attention has already been drawn to the fact that in Scotland it is the duty of the Procurator Fiscal, responsible

to the Lord Advocate, to initiate and conduct prosecutions in the public interest. The overriding consideration that the prosecution had to be in the public interest gave the Procurator Fiscal an element of discretion in which cases he brought to court and this allowed for a policy of 'no prosecutions' against consenting adults who engaged in homosexual acts in private. In the 1967 debate the Earl of Dundee took note of this:

'The Bill does not apply to Scotland and I think the reason may be that prosecutions in Scotland are conducted by a different method. I asked the Crown Office about this, and I was informed that efforts have been made to find when the last prosecution of two consenting adult males in private took place, but nobody was able to remember a single one. The reason is that in Scotland prosecutions can only be initiated by the Public Prosecutor, in this case with the consent of the Crown Office, and that, in fact, they are never undertaken, except in cases which would still be criminal offences under this Bill'.⁷⁰

Thus there would seem to be at least three main reasons why Scotland was not included in the 1967 measure; viz. the attitude of the majority of Scottish MPs, the attitude and influence of the Church of Scotland and the difference in the legal system which allowed for the Lord Advocate's policy of 'no prosecutions'. Yet even though the Sexual Offences Act had no validity in Scotland, its successful passage through Parliament in the summer of 1967, did have repercussions north of the border.

Parliament's approval of the reform undoubtedly caused the Church of Scotland to change its thinking on homosexual conduct in 1968. Within the Church these events strengthened the hand of the liberal Moral Welfare Committee while highlighting the short-sightedness of the more conservative General Assembly. Having studied the whole matter afresh the Working Party of the Moral Welfare Committee produced a memo in 1968 which read:

'the Committee now respectfully submits to the General Assembly its considered opinion that last year's deliverance has proved unhelpful'.⁷¹

The memo proceeded then to demonstrate the ill-effects of the policy. When the liberal attitude of the Moral Welfare Committee was first made known publicly through the media in May 1967, men suffering from homosexual tendencies began to seek help and counsel from the Church. However, from the day the Committee's proposed deliverance was rejected by the General Assembly, not one single man had come forward and those who had been coming never came back. Thus, the Church's work in rehabilitation and pastoral care had effectively ceased. The memo commented:

'it cannot be too strongly stressed that compassion rather than condemnation is the attitude likely to bring amelioration into this tragic condition. To condemn is to increase the guilt of the unfortunate victim which increases the probability of compulsive behaviour by forcing the impulses into further repression'.⁷²

Taking into consideration the Lord Advocate's policy of 'no prosecutions' the memo acknowledged that to change the law would not alter the situation in practice. However, it was argued that for the Church, through the General Assembly, to ask for such a change, bringing them into line with all the other major Churches in the United Kingdom, would mean that those with homosexual tendencies would be able to learn more easily of the Church's compassion and sympathy for their condition.

Accordingly, 'with a real sense of all the issues involved', the Committee recommended that the General Assembly accept the deliverance that homosexual acts between consenting adults in private should no longer be subject to criminal law, even although that law was not enforced. It was stressed that until this was done any successful and satisfactory rehabilitation work was doomed to failure because

practising homosexuals would be too afraid and guilt-ridden to make any approach.

The 1968 General Assembly received this further report of the Moral Welfare Committee more favourably than on previous occasions:

'The General Assembly, whilst not condoning or approving homosexual acts, urge: (I) that a more sympathetic understanding of the difficulties and handicaps of those suffering from homosexual tendencies is required throughout the community, and regret the comparative lack of psychiatric and medical treatment available; (II) that ministers show special pastoral concern and care of those suffering from such tendencies; (III) that Her Majesty's Government consider whether homosexual acts between consenting adults in private should continue to be an offence under the Law of Scotland'.⁷³

Thus, by 1968 the official Church of Scotland policy had swung round tentatively in favour of law reform in order that the Church might offer pastoral care on a more understanding and less condemnatory basis. Feeling within the Church though, was by no means unanimous with pockets of hard line resistance proclaiming that 'the legislative battle has been lost...(and) the devil has won'.⁷⁴ Nevertheless, however tentative the swing of opinion, the Church's revised thinking was an important turning point in that its acceptance of the need for law reform opened up the issue for further debate in Scotland.

As a response to both the English reform in 1967 and the revision of the Church of Scotland's thinking in 1968 a series of meetings were held by a number of interested individuals to discuss the position of the homosexual in Scotland and the possibility of setting up a formal pressure group to push for reform. From these meetings the Scottish Minorities Group was formed in May 1969. The aims of the SMG were fourfold - to promote the establishment of legal and social equity as between homosexuals and heterosexuals; to provide positive help to homosexuals who were experiencing difficulty in adjusting to their

orientation; to present facts and information about the everyday life of homosexuals to educationalists and those engaged in counselling; and to encourage new thinking about places where homosexuals could meet socially in a congenial atmosphere. Initially there were branches in Edinburgh and Glasgow, but later as the organisation developed, a number of other branches opened throughout Scotland operating semi-autonomously. Administratively it was structured on a relatively simple basis with an annual general meeting of paid-up members electing an executive committee of office-bearers. The executive acted as a steering committee organising group discussion and action, but major policy decisions were taken at the annual general meeting.

SMG thinking was that ignorance was at the root of much of the prejudice and discrimination from which arose many of the problems of being homosexual and so early activity was designed to dispel this ignorance and educate public opinion. In an attempt to raise the level of awareness and secure social equity for the homosexual, the SMG recommended to the Millar Committee on Religious and Moral Education in Scottish Schools, that sex education should include reference to homosexuality, and that the same moral principles should apply to homosexual as to heterosexual relationships. The Group also liaised with social work agencies, clergy, psychiatrists and lawyers to discuss the problems of homosexuals.

This early activity then, was rather tentative. Two main reasons would appear to emerge for this. Firstly, the SMG was still striving to be accepted as a legitimate pressure group, by the public, by the government and by other pressure groups, and so there was an understandable wariness and hesitancy in their approach. Secondly, in these early days the SMG still had to decide how it was going to operate tactically and politically.

Come the seventies the activities of the SMG began to gather momentum. Concern was focused not only upon the need for legislative reform but also upon the development of the SMG itself. The tendency towards a low profile and 'keep quiet' attitude gradually began to change as the SMG began to assert itself more. In 1971 at an important and well attended public meeting in the Heriot Watt University Union the decision was taken to go ahead and establish 'gay centres'. The risk though, was that such action might affect the policy of 'no prosecutions'.

By 1972 the Group had organised the first gay dances in Scotland, held in Father Anthony Ross's premises in George Square. These were so successful that people were travelling to them from as far away as the North of England and the Midlands as well as from all over Scotland and were far in advance of anything that was happening outside of London. In 1973 the Group organised a major conference on homosexuality, with a number of prominent guest speakers addressing the meeting. The Conference focused on the injustice of the homosexual's position in society and urged change in the law if the homosexual was to attain the fundamental freedom which other citizens took for granted.

Speaking at this conference was the Rev. L. D. Levison, Convener of the Moral Welfare Committee, who argued that the law was being brought into disrepute and ought therefore to be changed:

'The obvious advice to give to responsible citizens in a democracy is - "If the law is unjust, then work hard to change it!" - and this is surely the primary advice in our own treasured democratic society.... The Church of Scotland believes that the law in Scotland needs to be changed, even though that would not alter the present position in practice. The effort by the Church to help in the removal of the criminal sanction is in itself an expression of sympathy of the Church for the difficulty under which homosexuals have had to exist'.⁷⁵

With improved co-ordination of activities at the national level and improved public awareness of the issue, the mid-70s saw the opening of the first 'gay centre' at Broughton Street, Edinburgh. By now the policy of the SMG had become much more hard-line. Even the more conservative members now accepted that a struggle was going to be necessary before law reform would be achieved. The aim was to embarrass the establishment into activity.

To this end pressure was put on MPs. SMG Secretary, Mr. Ian Dunn, said that MPs were lobbied every year on the issue and commented that it was 'a most depressing job'. They even produced their own Bill which they hoped to get sponsored. A delegation went down to Parliament to see Lord Archibald and Tom Oswald (Lab. Edinburgh Central) about legislative action. Oswald's involvement was surprising because he was in the mould of the 'traditional' Labour MP and tended to be slightly puritanical about such issues. However, his support was later explained by the fact that his son turned out to be homosexual. Ian Dunn reflected on this encounter:

'The SMG learned a lot from that experience because although we didn't realise it at the time, we were being softened up by the system. We were being given the line - "yes, we are very sympathetic to your cause, but for goodness sake don't let extremists take over and spoil things". - By the time of the Sexual Offences consolidation in 1976 we were much better geared up on the parliamentary process'.⁷⁶

Contact was also established directly with the Crown Office. With every new Lord Advocate a delegation was sent to seek assurances on the policy of 'no prosecutions'. While these assurances were always forthcoming at first, they were only verbal and not written. SMG feeling was that the Crown Office in the earlier part of the seventies was trying to appease the protagonists on both sides of the argument. To those hostile to any suggestion of reform the Crown Office

could say that the law as it stood still allowed for prosecutions, while to those advocating reform it could say that a 'no prosecutions' policy was being pursued and that this administrative discretion placed Scotland on a par with the rest of Great Britain, so reform was not really needed. Written assurances were eventually obtained in 1973. By this time Ian Dunn thought the Government had become aware of the quality of the people they were dealing with. They finally realised, he said, that 'we weren't irresponsible queers, but articulate and responsible members of the community'.⁷⁷

Naturally though, for a group espousing the cause of homosexual equality the SMG was not without its opponents. In the mid-70s that opposition focused upon the Broughton Street centre. Both the centre and its activities were vigourously opposed by the local residents association and by the Tory district council. Although a certain amount of stigma remained Ian Dunn felt that the climate of opinion did change for the better as the seventies progressed with more tolerant attitudes becoming apparent. Despite the localised opposition to the gay centres, public opinion in general was fairly relaxed towards them. For instance, he indicated that in London it was not an uncommon occurrence for gay centres to be violently smashed up by young fascists, whereas at the Scottish centres there had been no attacks, with the occasional exception of a Saturday night drunk throwing a stone at a window. That the gay centres were tolerated in 1975 but would not have been at the beginning of the decade was perhaps one way of measuring a change in public feeling.

However, not all of the problems or obstacles to reform lay in the community at large:

'Some of the major difficulties came not from the public but from within the movement itself. Internal disputes on policy and the "politicisation" of many of the issues

caused splits and disagreements. By the late seventies internal politics had caused an evaporation of the consensus which had prevailed in earlier years'.⁷⁸

Since the issue was never brought up for discussion, parliamentary opinion in the early seventies was rather difficult to judge. Ian Dunn suggested that the elections of 1974, and the change of some MPs had made some difference. For instance, George Reid (SNP E. Stirlingshire and Clackmannan), Margaret Bain (SNP Dunbartonshire East) and Robin Cook (Lab. Edinburgh Central) were all sympathetic to reform. However, these changes were really only minor he said;

'Of more importance was the decision to change the style of activity around the mid-70s and to work within organisations such as the unions and the Labour party to promote the homosexuality issue. This represented a more pragmatic approach to the problem'.⁷⁹

An opportunity for parliamentary debate on the issue did arise though, in rather unusual circumstances in 1976 when the Sexual Offences (Scotland) Bill came before the House. This was an administrative measure which was intended to codify existing statutes and was tantamount to a 'non-decision' on the homosexuality issue in Scotland. The Bill's principal concern was to consolidate a wide range of heterosexual offences, but also included at Clause 7 was a reference to homosexual conduct, and it was the inclusion of this section that caused controversy.

The Lord Advocate at this time, Ronald King Murray, argued that the Bill was simply a consolidation of existing law and as such did not upgrade, modernise or give added weight to the old statutory provisions which were being consolidated. The point of the consolidation, he insisted, was to bring together in one Act the statute law as it was and not as some people would like it to be. He warned the enthusiasts for reform that the consolidation procedure would be rapidly destroyed if they abused it or bent it to promote their own special

reforms. 'Consolidation does not prejudice reform ... indeed, it may be a prelude to it in that it may highlight areas of the law which may be thought to need review'. Moreover, he added, consolidation 'does not imply any change in prosecution policy. Crown Office policy under successive Lord Advocates ... has been and remains that there should in general be no prosecutions for homosexual acts carried out in private between consenting adults'.⁸⁰

While conceding that the Bill would be of some limited benefit to lawyers, Malcolm Rifkind (Cons. Edinburgh Pentlands) berated the Government for the measure. If the Government found that they had sufficient parliamentary time for consideration of the Bill, he said, then they should have used that time for legislation to modernise the Scottish law on sexual offences instead of merely consolidating it. It was one thing to overlook a provision almost 100 years old, but it was a different matter for Parliament in 1976 to include in a statute a provision which there was no intention of enforcing. It was unsound and did Parliament and the public a disservice:

'The basis of my opposition to the clause is that it is totally wrong as a matter of basic constitutional principle that Parliament should be asked to approve in a consolidation measure an activity continuing to be a criminal offence while at the same time the Lord Advocate informs the House that the Crown has not the slightest intention of treating such an activity as a criminal offence despite Parliament so determining.... (A)s a Parliament we must be conscious not simply of the technical consequences of what we are doing but of the effect that it will reasonably have on public attitudes towards the matter'.⁸¹

Robin Cook endorsed this view and pointed to the progressive social climate and to the change in the law in England and Wales. He argued that it would be intolerable if an act which took place in private and affected only the private life of those taking part was to be subject to criminal action in Scotland after it had ceased to be

a criminal act in the rest of Great Britain. Likewise, Leo Abse commented that whereas Scotland had been in advance of England and Wales in the sixties with its policy of 'no prosecutions', it had now sadly fallen behind. There was nothing worse than maintaining unenforceable law.

He dismissed as 'utter hypocrisy and humbug' consolidating a provision which was never going to be implemented. George Reid was also concerned about the possible repercussions of the measure.

He observed:

'Some members of the Scottish minority groups who have been left in peace in recent years fear that they are being stigmatised as common criminals in a piece of 1976 legislation... Its inclusion, while it will not change the law, is bound to reinforce and buttress it and give it new prominence in the public mind in Scotland'.⁸²

These arguments, convincing though they were, did not impress the Lord Advocate. He stated:

'...I would emphatically refute any suggestion that an old enactment is somehow less potent than a recent one and so less qualified for consolidation, or that the inclusion of an old provision in a current consolidation revitalises it or gives it new force'.⁸³

Of course the passage of the Bill was a formality, but the occasion did provide a useful opportunity for public debate and those sympathetic to reform were able to pinpoint some of the anomalies and absurdities present in the existing law. Nevertheless, the issue still remained unresolved through this 'non-decision'. This will be discussed again later.

Determined to keep the issue alive both Lord Boothby and Robin Cook brought Bills before Parliament the following year in 1977 to amend the law relating to homosexual offences. Cook's Bill failed to obtain a Second Reading being deferred on several occasions, but Boothby managed to steer his successfully through the Upper House, although he had to face some dogged opposition determined to define

the issue off the political agenda with a series of arguments which scarcely disguised their underlying hostility to the subject.

Introducing the Bill, Boothby pointed to the fact that the Lord Advocate could not bind his successors so that there was nothing to prevent a future Lord Advocate from re-introducing a policy of prosecuting consenting adults in private if he so desired. However unlikely this was, homosexuals had to live with this uncertainty. Further, choosing not to enforce the law was bringing the law itself into disrepute: so the only sensible course of action was to change the law.

This argument though, did not impress Lord Ferrier who suggested that the matter should be left to a Scottish Assembly to deal with.

'What must be appreciated is that the flagrant existence of this kind of behaviour in almost any community can be a profound shock to decent people. My compassion goes out to this majority, whose voice is so seldom heard in an increasingly permissive society. What with X-films, pornography, lewd and even blasphemous gramophone records, where are we going? In saying this, I emphasise that I also regard the mentally unbalanced with sincere compassion.... (I)f the Assembly is constituted then that will be the proper place for a Bill of this nature as it is essentially social and entirely Scottish; not here in Westminster at this time'.⁸⁴

Other arguments were also produced in an attempt to remove the issue from the agenda. For instance, Lord Strathclyde claimed that the change was not wanted by the people of Scotland as he knew them, while Lord Campbell of Croy also did not see any urgent need for the Bill since no one in Scotland was being discriminated against or being unfairly treated.

These arguments, however, were something of a ploy since those who advanced them did little to conceal that what they really wanted was the Bill to be thrown out and the issue not to be discussed at all. It was pointed out by Lord Monson that there was no guarantee that a Scottish Assembly would actually be established and therefore it was

up to Parliament, as the only body in the United Kingdom competent to legislate on the matter, to address itself to the problem. He was supported in this by Lord Hughes, who pleaded:

'Surely the remedy is to make the law what it ought to be, and it so happens that in that case the best course would be to adopt something similar, if not identical, to the law which now prevails South of the Border. If that were done then we would at least have done something in this House, and in Government, to make certain that we are not joining with those who choose the laws which they are going to obey'.⁸⁵

While Lord Boothby successfully guided the Bill through all its stages in the Lords, there was never any chance of it reaching the statute book because the Commons rarely finds time for a Private Member's Bill from the Lords. In this respect Boothby's Bill is best viewed as a gesture to enable discussion on the issue and the vote in the Lords, as a vote in principle for the Scottish law to be reformed to accord with practice. Such a reform though, was not to be achieved for another three years.

VI. The 'Politics' of the 1980 Reform.

In a move which aroused considerable controversy, Robin Cook, in July 1980, introduced into the Criminal Justice (Scotland) Bill, a new clause to amend the law of Scotland relating to homosexual offences. The objective of this clause was to remove from the Sexual Offences (Scotland) Act 1976 that section which made homosexual acts between consenting adults in private a criminal offence, and thus bring the law of Scotland into line with that of England and Wales. Cook was at pains to stress the modest nature of the clause and to keep the tone of the debate as unemotive as possible. He questioned the curious constitutional principle of not implementing the law through Executive decree and argued that 'the fact that no prosecutions are taking place

does not mean that no damage arises from the fact that homosexuality is a criminal offence in Scotland'.⁸⁶

Support for the clause was forthcoming from a number of different quarters. Several English MPs spoke in favour of the clause, their theme being the need for civil rights of this kind to be applicable on both sides of the border. Mr. Douglas Hogg (Cons. Grantham) could see no reason why people should have a lesser right in Scotland than they had in England and Wales. A pledge of support also came from Gregor Mackenzie (Lab. Rutherglen). He could not see the logic in keeping a law which was not being implemented. Leo Abse's support was qualified since he felt the clause did not go far enough. He thought Robin Cook was 'being far too accommodating to the prissy prudes who apparently oppose it'.⁸⁷

At issue was not only the substance of the clause but also the procedure by which it was introduced. The new clause had been moved by Robin Cook at the Report Stage of the Bill after the detailed scrutiny of the legislation in Committee. Hence it was suggested by his opponents that this was not the proper place or manner in which to insert a reform clause of this nature, and indeed, it was even hinted that such action bordered on the unethical. Donald Dewar (Lab. Glasgow Garscadden), however, took such suggestions to task:

'I have heard the argument in the corridors and the Lobbies that this Bill is not appropriate for the purpose and that hon. Members should not have popped in the new clause at this late stage of major legislation. I do not sympathise with that view... It seems appropriate, rather than waiting for Private Members' legislation, with all the difficulties of the ballot and the chance of a Scot who wants to take up this cause against competing causes, winning a high place, that we should take this opportunity.... As long as we continue this strange position of having a criminal law that is not enforced, we set up all sorts of tensions, prejudices, and difficulties for those who find themselves in this position'.⁸⁸

While Dewar was supported in this argument by the Shadow Spokesman on Scottish Affairs, Bruce Millan, the Secretary of State for Scotland, George Younger, took a less positive view of the clause's introduction, arguing that the clause was not the ideal way for the reform to be made. Accepting that the intentions of the promoters were honourable he nevertheless felt obliged to record that the clause was 'not perfect, and probably not the measure that we would enact if we had a chance to do so properly'.⁸⁹ He expounded his reasoning on this at some length:

'I refer to a matter which has not been properly aired. Hon. Members must ask - "Is this the way to pass important Scottish legislation?". Which-ever way they lean, hon. Members should bear that question in mind. They should ask whether on any other issue they would be prepared to pass something so important with as little discussion as this measure will receive... We often pass measures about which people feel strongly. When we do that the measure goes through an elaborate series of parliamentary occasions when the issues can be aired. Plenty of time is given for representations to be made by bodies that are involved and others who feel strongly... When passing important legislation which affects many people Parliament must convince the people involved that it has given the public sufficient chance to make their views known. It is no criticism of the hon. Member for Edinburgh Central to say that the public have not had that chance. They have not had that chance because the new clause was tabled on Report after the measure had been put through another place... Therefore, all I am saying is that the House, mindful of its reputation, of its duty to represent people in the country, should think hard and long before it passes something so important without giving adequate time or opportunity for those whom we represent to make their views known'.⁹⁰

Needless to say the speech infuriated Robin Cook who made no attempt to hide his anger and contempt. He found it particularly frustrating that although the Secretary of State had indicated that the clause was not defective he had proceeded to offer the opinion that it was not 'ideal'. Cook remarked sarcastically:

'I shall pull my socks up and bend my mind to the matter in future, and attempt to table amendments that are not merely not defective but are ideal'.⁹¹

He went on to criticise vehemently the 'organised hypocrisy' of a system whereby successive Government could indicate that they would not implement the law, but simultaneously resisted any attempt to change it. His response to the Secretary of State was short and sharp:

"Is this the way to pass important Scottish legislation?"
The answer is that it is indeed the way. There is no other way of passing important Scottish legislation'.⁹²

Despite the reservations of the Secretary of State, the division was left to a free vote and the new clause was carried by the substantial majority of 205 votes to 82. Of this overall majority there was a Scottish majority of 34 votes to 16 also in favour. In this new 1979- Parliament the Conservative Party were once again in power. However, in Scotland Labour remained the dominant political party with 45 seats, the Conservatives winning 22, the Liberals 3 and the SNP 2. The 50 Scots MPs that turned out for this Division represented just over 70% of Scottish Membership.

47.9% of the total Scottish Membership voted in favour of homosexual law reform, as opposed to 22.5% who voted against. It can be seen from Table 9.1 that of the 34 votes in favour, 31 came from the Labour Party. These 31 Scottish Labour MPs amounted to 70.4% of Labour's strength in Scotland. Only 2 Labour MPs, Ian Campbell (Dunbartonshire West) and James Dempsey (Coatbridge and Airdrie) voted against. All 3 Liberal MPs, Joe Grimond (Orkney and Shetland), Russell Johnston (Inverness) and David Steel (Roxburgh, Selkirk and Peebles) voted for the reform.

The striking feature of the vote against is that all 12 Conservative MPs who passed through the Division lobbies registered a "No"

vote. This can be explained by the 'instructions' issued to Conservatives from the Government Front Bench. While a free vote was allowed on the issue, George Younger left no doubt that the Government was unhappy about the inclusion of such a clause in the middle of a Government Bill. Younger urged that on grounds of procedure the amendment was best omitted from the Bill. Such a 'directive' was tantamount to unofficial whipping. This meant that certain Conservatives like Malcolm Rifkind, who were known to be sympathetic to reform and had publicly expressed so in the past, were more or less obliged by their position on the Front Bench to vote against the clause on technical grounds. The vote against in Table 9.1 also shows that both Scottish Nationalists were disinclined to support a reform.

Table 9.2 (Voting by Age Group) shows that there was a broad range of support which cut across age groups. Of the 22 MPs under 45 who voted, 16 or 72.7% voted in favour of law reform. Of the 28 MPs who were over 45 years of age and voted, 18 or 64.2% were in favour.

The voting by Religion (Table 9.3) reveals the small Catholic vote to have opposed the reform clause by a margin of one. However, the residual category of Protestants, Jews and atheists supported reform by a majority of 19.

The breakdown of voting by Schooling (Table 9.4) shows a clear majority of 26 votes to 10 in favour amongst those MPs who attended a Scottish Secondary. Those who had attended the roughly equivalent English Grammar also came out in support of reform 3 votes to nil. However, those who had had a 'public' education, either north or south of the border, divided against the proposed reform 6 votes to 3. Since it is predominantly Tory MPs who have received a 'public' education, this voting pattern is consistent with Table 9.1.

House of Commons Parliamentary Debate, Vol. 989, cols. 319-322.

Division on Clause concerning homosexual conduct (consenting adults over 21 in private) introduced by Robin Cook into the Criminal Justice (Scotland) Bill on 22.7.80.

Figures in Tables include Tellers.

*Party composition at time of vote: Lab 45; Cons 22; Lib 3; SNP 2.

TABLE 9.1 Scottish Voting by Party*

	Total vote	Scottish vote	Lab.	Cons.	Lib.	SNP
Aye	205	34 (47.9%)	31 (70.4%)	0 (-)	3 (100%)	0 (-)
No	82	16 (22.5%)	2 (4.5%)	12 (54.5%)	0 (-)	2 (100%)

TABLE 9.2 Scottish Voting by Age Group

	Total vote	Scottish vote	Under 35	35-44	45-54	55-64	65+
Aye	205	34	4	12	9	8	1
No	82	16	1	5	5	5	0

TABLE 9.3 Scottish Voting by Religion

	Total vote	Scottish vote	Catholic	Others
Aye	205	34	1	33
No	82	16	2	14

TABLE 9.4 Scottish Voting by Schooling

	Total vote	Scottish vote	Unknown	Scot. Elem.	Scot. Secon.	Scot. Indp.	English Grammar	English Public
Aye	205	34	2	0	26	2	3	1
No	82	16	0	0	10	3	0	3

TABLE 9.5 Scottish Voting by Higher Education

	Total vote	Scot. vote	Oxbridge	Other English	Scottish Univ.	Other H.E.	None	Unknown
Aye	205	34	5	1	14	5	8	1
No	82	16	5	0	3	3	5	0

TABLE 9.6 Scottish Voting by Region

	Total vote	Scot. vote	Borders	S.W.	Glasgow + 'west'	Edinburgh + 'east'	Central	N.E.	High- lands
Aye	205	34	2	3	16	4	5	1	3
No	82	16	0	3	3	4	1	2	3

TABLE 9.7 Scottish Voting by Occupation

	Total vote	Scot. vote	Professions	Misc. White Collar	Business	Forces	Workers	Unknown
Aye	205	34	5	22	3	0	3	1
No	82	16	5	2	7	0	1	1

Table 9.5 on Higher Education shows that those who attended a Scottish university were in favour of reform by 14 votes to 3. Similarly the categories of 'Other Higher Education' and 'No Higher Education' came out in support of law reform. 'Oxbridge', however, remained evenly divided.

Voting by Region (Table 9.6) illustrates that Glasgow and the 'west' came out strongly in favour. This is consistent with Table 9.1 since this area is dominated by the Labour Party. The 5 to 1 vote in favour in Central is also indicative of Labour strength in this region. The South-West, Edinburgh and the Highlands with more Conservative MPs voting against remained equivocal.

Table 9.7 shows the overwhelming majority in favour amongst the category of Miscellaneous White Collar (once again mostly Labour MPs). Those with connections in Business (mainly Tories) were not disposed towards a reform, while the Professions split evenly 5 votes for and 5 against.

The inclusion of the homosexual offences amendment clause into the Criminal Justice Bill placed the Scottish Minorities Group, or more correctly, the Scottish Homosexual Rights Group as they had now become, in something of a dilemma. The SHRG had been opposed to Labour's original Criminal Justice Bill in 1979 and had been in the forefront of the campaign to stop the Bill which was orchestrated from their offices in Broughton Street. As the Conservative Criminal Justice Bill contained a great many of the same provisions, SHRG policy was still one of opposition. So when Robin Cook informed them that he thought it possible to get the homosexual offences clause through they were left in something of a quandary. The SHRG were forced to reply that while the reform would obviously be welcomed, the Group could not publicly support the clause on two grounds: firstly,

the SHRG were officially opposed to the Criminal Justice Bill, and secondly, their policy on the question of the age of consent was now 'over 16', i.e. the same as that for heterosexual relations. However, while the SHRG did not lend formal support, they did organise a public meeting in the House of Commons' Jubilee Room shortly before Cook was scheduled to move the clause. Some 23 MPs attended, which they thought a very good turnout, along with representatives of the Scottish Council for Civil Liberties. This platform provided a useful means of getting the issues across to the MPs present without the SHRG committing themselves formally to backing the provision.

Contrary to widespread belief the clause was not identical to the English measure. The clause was in fact the Bill which Lord Boothby had tried to introduce in 1977 which differed in some important respects from the English legislation. Whereas the English legislation centred around the words 'in private', the Scottish drafting used the phrase 'not in public'. When this was discovered it caused considerable controversy and was the subject of amendment in the Lords. Another significant difference was the retention of discretion in cases involving under 21s. In Scotland each case was considered individually so it was unlikely that a prosecution would follow in a case where, say, the partners were 22 and 20. Critics complained that Scotland was trying to have the best of both worlds - legislative protection for the over 21s while maintaining administrative discretion for particular cases under 21.

In the interim period between the passing of the Bill in the Commons and its debate in the Lords in October, a storm broke over the definition of 'not in public'. In an article published in the homosexual magazine 'Gay News' reference was made to the new reform as 'a licence for orgy'. When a wider public came to realise the

implications of the legislative drafting there was an outcry which almost killed the clause.

The clause thus appeared before the Lords amid hostility and opposition. A series of amendments designed to tighten up the legal definition of consenting adults in private was tabled. The effect of the principal amendment was to restrict homosexual acts to two persons. If there were more than two persons present then the act would not be treated as having been in private. The Earl of Selkirk felt this a necessary safeguard if the Bill was to proceed. Boothby however, thought the amendment unnecessary as there was no need in Scots law for an English definition of privacy. As for the Earl of Perth, he had his own ideas:

'I have one other thing to say. There is not much one can say on this subject other than what has been said. But if Amendments No. 101A and 101B are passed, I intend as a consequential amendment to the amendment to the Commons amendment, to move a manuscript amendment which is really a drafting amendment'.⁹³

It was left to Lord Ross of Marnock (formerly Willie Ross, Secretary of State for Scotland 1974-76) to bring the debate back to reality with some plain speaking. He did not think that this was the right way to legislate in respect of an important piece of social legislation. There had been no great public discussion on the issue and no great demand for the reform. Further, he thought that the manner in which the clause was introduced was an evasion of the close public scrutiny that Bills were subjected to in Committee.

This line was backed by a number of their Lordships. The Earl of Lauderdale made the rather startling observation that had the Commons debate occurred with a full House, 'instead of being decimated by a garden party as it was', then the opposition would have been a good deal stronger. He felt that there was nothing to suggest that

Scottish opinion at large was seeking such a change in the Scottish Law and he wanted quite simply to define the issue off the agenda:

'... it would be better to throw this new clause out altogether so that on another occasion it may be duly considered in the light of proper public discussion in Scotland and still more proper consultation through the channels that are familiar'.⁹⁴

The Earl, however, could not conceal his personal distaste for the subject:

'We are talking about a disagreeable subject and there are those who would rather we did not discuss it at all'.⁹⁵

In his opinion the clause had been 'smuggled in without proper consideration'.⁹⁶

Others subscribing to this view that it had been 'smuggled in' were Lord Galpern, who suggested that it was 'deliberately slipped in at that stage by Mr. Cook in another place because the purpose was not to give it adequate discussion';⁹⁷ and Lord Ferrier, who regarded the clause as nothing less than a 'swizz ... got in by some sort of very successful manoeuvre'.⁹⁸ Lord Drumalbyn even went as far as to say that it was an 'abuse of parliamentary procedure to rush in legislation at the tail end of an extremely long session'.⁹⁹

That the clause had been introduced by this 'slick method' caused them all no end of irritation. However, Lord McCluskey (Solicitor General 1974-79) queried if this was not the way to introduce the reform then what was the way? He pointed to the vagaries of the Private Members' Ballot and argued that the chances of a sympathetic Scottish Member winning a high place in the ballot and successfully steering a Bill through Parliament in the following Session were practically nil. Further, he drew attention to the Commons vote on the issue which was 205 to 82. Of the 50 Scots who voted, 34 voted in favour of the clause and 16 voted against, and this he thought was a

sufficient majority on which to proceed. Unless the opportunity was taken to use the Criminal Justice Bill as a vehicle for reform there would be another long delay before the law was brought logically into line with practice, he warned.

Lord Foot also took the clause's opponents to task over their suggestion that there had not been adequate discussion on the issue and that it was being pushed through the House in some underhand way. He said:

'That surely is the most artificial of all criticisms that could be levelled. The fact is that the problem of homosexuality has been a matter of public discussion not only in England and Wales, but in Scotland and Northern Ireland for that matter, ever since we have had the Wolfenden Report. It has been a subject of fierce controversy and discussion throughout the whole of the realm over the last 13 years since the passing of the Act in this Parliament'.¹⁰⁰

A rather shrewd assessment of 'popular' opinion in Scotland was offered by Lord Taylor of Gryfe. He thought that such was the prejudice and emotion aroused by the issue in Scotland that there would probably be a majority against the clause. However, there were occasions when the rights of minorities had to be respected and this was just such an occasion.

At the end of an impassioned debate then, it was a close run thing. In a free vote the clause, as amended, was passed by 59 votes to 48. Thus, the Law of Scotland relating to homosexual offences was finally brought into line with existing practice. The reform had taken some 13 years longer than the equivalent reform south of the border.

VII. Homosexual Law Reform in Scotland : A 'Non-decision'?

Controversy surrounded homosexual law reform in Scotland right up until the very last moment of its legislative enactment. Yet the

subject remained almost a 'non-issue' throughout the duration of the 1970s. What were the reasons for this? Why did it take 13 years longer to reform the law in Scotland than it did in England and Wales?

The reasons why Scotland was not included in the 1967 Sexual Offences Act were noted earlier. Three main reasons were identified: the opposition of Scottish MPs, the attitude of the Church of Scotland and the Crown Office's interpretation of the law. This last reason, that of the non-enforcement of the law was also one of the principal reasons why the homosexuality issue remained dormant for the greater part of the seventies. The Lord Advocate's policy of 'no prosecutions' against consenting adults in private had the effect of dis-arming demand for reform. It was argued that this administrative discretion placed Scotland on an equal footing with England and Wales. In fact, it was even claimed that this allowed the law of Scotland to be in advance of that south of the border since it allowed for sympathetic discretion in certain cases involving under 21s. The Crown Office did not regard the issue as a problem and this influenced perceptions of the need for legal change. Pressure for reform could thus be easily diffused. As Donald Dewar remarked, 'there was no real pressure to do anything since the Lord Advocate was adopting a policy of no prosecutions'.¹⁰¹

Organised pressure for reform itself would seem to have been inchoate. The formation and development of the SMG has been charted earlier and it will be recalled that its early years were spent gaining self-confidence and defining its own role as a group as much as pressing for legislative reform. With a greater level of confidence came more sophisticated demands and from the mid-70s onwards SMG activity was directed towards achieving full equality for the homosexual in the community rather than merely obtaining legal change. In 1978

it published a declaration of rights covering aspects of law, employment and education which formed the basis of their campaign against prejudiced attitudes. Somewhat paradoxically, as the group's activities became more 'politicised' and the scope of their demands became more radical, they became less concerned with short term legal reforms. So much so that when reform was achieved in 1980 they could not publicly support the clause for fear of contradicting their longer term objectives. Actual law reform therefore, was not the primary consideration of the SMG, but was subsidiary to, in its early years, the successful development of the Group itself, and in later years, to wider and more far reaching objectives concerning the homosexual's place in society.

Public opinion generally would appear to be another reason for homosexuality being a 'non-issue'. The nature of the subject was not one which stirred the public mind. Reaction to it usually fell into one of two categories - complete indifference or open hostility. As Dennis Canavan commented, 'there was still a lot of prejudice in Scotland, so it was not a popular cause to espouse'.¹⁰² Harry Ewing put it down to 'the Calvinistic approach to life found in Scotland'.¹⁰³ As a result of this public distaste for the subject, MPs were reluctant to get involved in the issue. 'It was not the type of issue with which an MP likes to be associated',¹⁰⁴ said Robert Hughes. It was not a subject which did a politician any good in electoral terms, consequently most MPs would tend to tackle another subject if they were lucky enough to come up in the ballot. Malcolm Rifkind thought that majority opinion was probably against homosexuality and homosexual law reform throughout the seventies, although he felt it did become more tolerant as the decade progressed;

'In the late 60s and early 70s opinion still tended to be shocked by homosexuality. However, as the 70s progressed, although there may still be disapproval about homosexuality per se, a more tolerant attitude towards the actual existence of homosexuals has become more evident'.¹⁰⁵

Thus, widespread 'popular' opinion was by no means clamoring for a legislative reform.

One further reason postulated by Neil Carmichael for the inaction on the issue was that successive Secretaries of State were not enthusiastic about the matter. He believed that in the early seventies Willie Ross would most certainly not have approved:

'Willie was a nice bloke, very able with a memory like an elephant. He was a schoolteacher of course, and had a schoolteacher's attitude towards the rest of us - puritan, Calvinist; a "father figure". He didn't really recognise such a thing as homosexuality - it was an anathema to Willie'.¹⁰⁶

Nor would it seem were successive Lord Advocates particularly perturbed by a situation described in Parliament as 'totally wrong as a matter of basic constitutional principle'. They appeared content simply not to implement the law. Yet the inconsistency of the situation was highlighted by the Sexual Offences Act in 1976 which, to all intents and purposes was a legislative 'non-decision'. Of course, a consolidation in no way alters the status of the law, but merely codifies in one piece of legislation several related statutes. However, one of the side-effects of the 1976 Sexual Offences consolidation was that it appeared to some as a modern 'endorsement' of the law and was therefore viewed as being at odds with the publicly stated policy of 'no prosecutions'. The issue at stake was whether Section 7 concerning homosexual offences should have been included at all. That it was represented a 'non-decision' on the part of the Lord Advocate who, in effect, simultaneously maintained the letter of the existing law while operating a policy of 'no prosecutions'.

The consolidation was multi-departmental involving the Scottish Law Commission, the Scottish Office and the Crown Office. King-Murray apparently was viewed by his colleagues as an active and hard working Lord Advocate whose personal style favoured codification rather than dramatic reform. Normally, consolidations are uncontroversial measures which are passed through Parliament formally, but the circumstances of the Sexual Offences consolidation were exceptional enough to prompt an unexpected debate, the effect of which was to give a public airing to the anomalies present in the Scottish law.

When both Cook and Boothby persisted in the later seventies in highlighting these anomalies they were faced with a cabal of parliamentary opposition which displayed all the characteristics of the Freudian repressions encountered by Abse in his earlier struggle to get the 1967 English reform through. Very similar arguments were presented expressing distaste and repugnance for the issue, 'homosexuals are sick people'; 'Lord Advocate's policy not discriminating against any one'; 'not wanted by the people of Scotland as I know them'. These arguments, which were seeking to define the problem off the political agenda, did little to camouflage the residual fears that still remained among many politicians, and indeed among certain sections of the public at large.

Thus, to summarise briefly: the Lord Advocate's policy of 'no prosecutions' was the principal factor in homosexuality remaining a 'non-issue' in Scotland for the best part of a decade. Given the lack of prosecutions there were quite simply fewer 'practical' reasons or pressures for reform. In conjunction with this the 'nature' of the subject was not one which aroused widespread interest and significant sections of opinion continued to view the issue with either distaste or, at best, considerable caution. It thus fell to a few courageous

individuals not only to sustain a campaign for law reform but also to educate and enlighten the darker areas of Scottish consciousness.

VIII. 'Is this the way to reform important Scottish legislation?'

Given the manner in which the Labouchere amendment of 1885 was tabled in the House, there was a certain irony in the approach adopted by Robin Cook in his 1980 reform which effectively revoked that old clause. Back in 1885 Mr. Labouchere inserted his homosexual offences clause into the middle of a Criminal Law Amendment Bill; almost 100 years later Mr. Cook inserted his reform clause into the middle of the Criminal Justice (Scotland) Bill. Whereas the Labouchere amendment had taken a sleepy Commons by surprise during the course of an all-night sitting, the Cook amendment had the effect of provoking Honourable Members into a procedural uproar. 'Was the clause in order?', cried opponents to reform; 'was it not a breach of parliamentary ethics?', they demanded to know. The answer, in brief, was that 'yes, the clause was in order', and 'no, it was not an abuse of parliamentary procedure'.

Before the clause ever came before the House, private consultations had taken place off the record between Robin Cook and his supporters and the Government as to whether the amendment should be moved in Committee or on the Floor of the House. While the Government expressed its reservations over the clause being introduced at all, they nevertheless indicated that the most appropriate time to move it would be at the Report Stage. Robin Cook revealed:

'As far as the controversy over procedure was concerned I had already consulted with Malcolm Rifkind who advised that the fairest time to introduce it would be on the Report Stage so that the whole House would be able to debate the issue'.¹⁰⁷

In this respect there was no way the clause was 'smuggled in' because its introduction was in accordance with Government advice.

None of the clause's supporters were in any doubt as to the procedural legitimacy of the action. Harry Ewing felt the Criminal Justice Bill was an 'ideal opportunity to put the reform through',¹⁰⁸ while Neil Carmichael stated categorically, 'the clause was in order and it was a perfectly legitimate way to proceed'.¹⁰⁹ This sentiment was echoed by Bob Hughes, 'the new clause was in order and that's all that matters in this place'. Mr. Hughes did admit though to having been 'taken aback' by Parliament's acceptance of the clause because 'seldom does Parliament show such initiative and good sense'.¹¹⁰ Others complimented Cook on his astuteness. Bruce Millan thought 'it was a nice piece of initiative on Robin's part',¹¹¹ while a distinguished member of the legal profession, Menzies Campbell, remarked that 'it was good buccaneering stuff and a neat example of parliamentary tactics'.¹¹²

The Minister responsible for the Criminal Justice Bill, Malcolm Rifkind, confirmed that discussions had taken place concerning the most appropriate time to introduce the clause. He said it was the Government view that time should be allowed for representations from outside bodies, although he could understand Cook's tactics and was not unduly upset personally at the clause being carried.

At first Cook was doubtful whether such a clause would actually succeed, but 'the situation really snowballed when the Saunders case broke in the press'.¹¹³ The case in question involved John Saunders, a gardener-handyman who was dismissed from his job at Dounans School Camp, Stirlingshire, on the sole ground that he was a homosexual, and thus constituted a threat to the children visiting the camp. That Mr. Saunders failed to win an appeal for unfair dismissal at an

industrial tribunal only served to highlight how vulnerable homosexuals were before the law and how minimal were their rights. The publicity which the case received was a piece of good fortune for Robin Cook because it brought to the attention of the public at a critical moment the fear and oppression under which homosexuals had to exist.

However, this fortuitous media exposure apart, the success of the homosexual law reform in Scotland in 1980 was due in large part to Robin Cook. Cook though, would be the first to give credit to a small band of MPs and Peers, among them Bob Hughes, Neil Carmichael, David Steel and Lord Boothby, who supported and sustained a campaign for reform from very early on. Nevertheless, it was Cook's political astuteness that finally won the day for the reform lobby. He showed considerable parliamentary skill and shrewdness in introducing and guiding his clause through the House, emulating in a remarkable way many of the qualities demonstrated by Leo Abse over a decade earlier. Quite simply he recognised and seized the opportunity to legislate. As one colleague remarked, 'It was a case of opportunism alright, but certainly legitimate opportunism. That's the way things are done in this place'.¹¹⁴

The question then, posed by Younger - 'is this the way to reform important Scottish legislation?' - must be answered in the affirmative. Robin Cook has demonstrated empirically that this can be the case. However, if one considers the question as 'ought this to be the way', then even the reform's most ardent supporters might concede that, although technically competent, it was not necessarily the most satisfactory way for a Scottish reform to have to go through. Yet it did go through in this manner because the existing alternatives had failed. These alternatives were outlined in Chapter 8. Only the Ballot offers

a realistic chance but this had failed to yield even a reform attempt, let alone a reform in the thirteen years following the English enactment. Even if the view is taken that the reform ought not to have been conducted in the way it was, Private Members' legislation being a more appropriate vehicle, experience showed that the chances of a sympathetic Member winning a sufficiently high place in the Ballot were remote, and moreover, that there was absolutely no guarantee the situation would change in the immediate future. If a high Ballot place cannot be won by a sympathetic Member, and if the Government decline to assist with parliamentary time, then those seeking important legislative reforms will use whatever legitimate methods are available to them to have those reforms enacted.

IX. Conclusion

Homosexual law reform, and its 'non-reform' throughout the seventies, is another case which has to be viewed in the context of Scottish history and politics. It is a case which highlights Scotland's need, because of the maintenance of its own legal system, for certain types of legislation to be framed separately in the idiom of Scots Law. And it is a case which illustrates the way in which social mores can vary north and south of the border, despite the increasing assimilation of Scottish society to that of England.

The original pressures for change, however, came from England. It was the Church of England in conjunction with the Howard League for Penal Reform which initiated the pressure that led to the setting up of the Wolfenden Committee, and it was its subsequent Report that set the tone of the debate in the late fifties and the sixties. Later, pressure was to come from the Homosexual Law Reform Society which had been founded in 1958. It worked in close harmony with Leo

Abse to change the law, but at no time did Abse ever become its political pawn, insisting on his independence so as to allow himself scope for manoeuvre. Legal opinion on the matter appeared to be rather muted with no major policy documents or statements featuring prominently in the English debate. And the role of the medical profession seems to have consisted of assisting Wolfenden in reaching a more enlightened definition of the condition of homosexuality than had hitherto prevailed.

There is little evidence to suggest any pressure for a legislative reform in the law relating to homosexual conduct north of the border in the late fifties or for most of the sixties. In fact the reverse seems to be true. In spite of Wolfenden's recommendations, a deliverance of the General Assembly of the Church of Scotland in 1958 came out firmly against any revision of the homosexuality laws, and this remained the Church's policy for the next ten years until 1968. It was not until after the success of Abse's Sexual Offences Act 1967, and after the Church of Scotland had revised its thinking, that tentative liberal pressure for reform began to emerge. The Scottish Minorities Group was set up in 1969 with the aim of promoting social and legal equity between homosexuals and heterosexuals, and it was this pressure group which more or less single handedly campaigned for reform throughout the 1970s. Some Church of Scotland ministers lent occasional support to the campaign but the Church as a body did not undertake any sustained lobbying of its own. The Roman Catholic Church was also cautious. While it expressed concern that homosexuals should be treated with understanding and sympathy it could find nothing in its teachings which would give moral justification to homosexual acts. Neither the medical profession or the legal profession had much to say on the issue throughout the seventies, although the

Scottish Law Commission was responsible for co-ordinating the Sexual Offences Consolidation in 1976. The Crown Office, of course, was of critical importance to events.

In the fifties, the Wolfenden Report identified the lower rate of prosecutions in Scotland for homosexual offences committed in private and attributed it to the differences in criminal procedure either side of the border. From at least this time (and perhaps from even earlier) the policy of the Lord Advocate in Scotland was one of 'no prosecutions' against consenting adults in private. This administrative discretion of the Lord Advocate lay at the very heart of the matter. It meant that although homosexual acts in private between consenting adults remained on the statute book as a criminal offence, the strict letter of the law was not being enforced. Supporters of this discretion argued that prior to 1967 Scotland was actually in a more advanced position in relation to England, and that after 1967 it was at least on level terms. Opponents though, pointed out that such an arrangement not only brought the law into disrepute, but also placed homosexuals in Scotland at a disadvantage since it was not possible to guarantee that a 'no prosecutions' policy would be continued by future Lord Advocates. Whichever way it is viewed, however, there can be no doubt that the interpretation of the law in this way by successive Lord Advocates was one of the main reasons why there was no parliamentary reform in the 1970s. There had been an administrative reform, but no legislative reform.

As with the divorce issue, the attitudes of different governments were important, the willingness of the 1966-70 Labour administration to grant additional parliamentary time to Private Members' issues which were considered in the public interest to warrant full debate was of crucial importance to the success of Leo Abse's 1967 Sexual

Offences Act. The Home Secretary, Roy Jenkins and the Chief Whip, John Silkin, were again the men behind these guarantees. The Conservative and Labour administrations which followed in the 1970s, however, were not inclined to take such a magnanimous stance, either towards the issue of homosexuality, of which there were few reform attempts in any case, or towards Private Members' legislation in general.

Homosexuality, as an issue of morality, is outwith normal party political squabbles. It is, by its nature, not a subject with which many MPs of either party wish to be associated. This was especially true in the fifties and early sixties when to speak in favour of reform, or even in sympathetic terms, could have serious consequences for the career of an aspiring young MP. While it would be difficult to prove that Humphrey Berkeley lost his seat because of his support for reform, he himself has admitted that it cost him a lot of votes. The political parties, then, were not prepared to take homosexual law reform on board officially as party policy, since they perceived the issue was distasteful to a majority of the electorate and therefore a potential vote loser.

Thus, the role of the individual MP was again of vital importance. In the course of the debates on homosexuality there were many interesting, often spectacular, contributions both for and against reform. Influential contributions in favour of reform came from Humphrey Berkeley, the Earl of Arran and Robert Boothby (later to become Lord Boothby). It was their endeavours which were to pave the way for the 1967 reform, and in the case of Boothby, it was his perseverance in highlighting the anomalies which persisted in Scotland in the 1970s which eventually led to the successful amendment in the Criminal Justice (Scotland) Act 1980. On the other hand, Sir Cyril Osborne

and Cyril Black in the English context, and Lord Ferrier and Lord Strathclyde in the Scottish context, did their utmost to block the progress of reform.

These figures, though, are best considered as supporting actors. The lead roles were taken by Leo Abse and Robin Cook. Although their influence on events was some thirteen years apart, there exists a quite remarkable parallel between these two men. While the respective reforms emerged under different procedural conditions it was largely through their quick-witted opportunism and political alertness that change was achieved. Both sustained lengthy personal campaigns to keep the issue alive in Parliament and both encountered the same type of hostile opposition. This opposition desperately wished to remove the issue from the agenda, but only succeeded in revealing its prejudices, anxieties and repressions about the subject. Both Abse and Cook handled such opposition with similar style and wit to keep the tone of the debate as calm and as unemotive as possible, and in so doing managed to shape a climate of opinion conducive to reform. Their contributions cannot be over emphasised.

Parliamentary procedure was another factor which influenced the outcome of the homosexual law reform issue both north and south of the border. As noted above, and as with the divorce issue, the granting of extra parliamentary time for debate was crucial to the success of the English reform. Without such time Abse's reform Bill would have stood no chance. Even with the additional time the passage of the Bill was far from plain sailing, Abse having to work extremely hard to obtain the necessary closure motions to prevent a filibuster.

The procedure in Scotland was nothing if not novel. With no one in successive Ballots apparently prepared to take up the issue, with the repeated failure to get the matter off the ground through the

Ten-Minute Rule procedure and with Bills introduced in the Lords failing through time, Robin Cook ingeniously put a reform clause into the middle of a Government Bill. This caused not a little controversy, but it was nonetheless procedurally in order. While the Secretary of State, George Younger, questioned whether it was the most appropriate way to legislate on the issue, he had little option but to accept the situation and declare a free vote, although not before he had obliquely directed members of his own party not to vote for the clause. This instruction was obeyed to a man for not a single Conservative registered an 'Aye' vote in the Division. There is no doubt that this must have embarrassed some Conservatives such as Malcolm Rifkind. A member of the Government Front Bench he was obliged to vote against the clause even although he had been an ardent supporter of reform in the latter half of the seventies. This was perhaps the closest the issue came to being involved in 'party politics'.

The effect of public opinion on the issue has been rather difficult to judge. Homosexuality and homosexual law reform are not matters to which the general public are keen to address themselves. When they do, the responses they give are often highly emotive because of the nature of the subject. To recap a point made in the conclusion to the last chapter, it is sometimes a case of what public opinion will 'stand for'. In this sense, public opinion in England seems to have coalesced as the sixties progressed to a point in 1967 when reform was seen as tolerable; homosexual relations between consenting adults in private might still be morally wrong, but this was not considered in itself to be sufficient reason for classifying the activity as a criminal offence. In Scotland in the sixties such tolerance does not appear to have existed amongst the masses, or at least this was the way parliamentarians interpreted opinion. The irony was that

while Scottish opinion appeared unwilling to accept reform, it was already tolerating (perhaps unknowingly?) a policy of 'no prosecutions' by the Lord Advocate. And this rather ambivalent position was to persist for much of the 1970s.

The perceptions that parliamentarians had of homosexuality and of homosexuals were obviously important in influencing their attitudes and decisions. MPs' and peers' positions on the question of law reform stemmed from the way in which they perceived and conceptualised the issue. Many of those against reforming the law pertaining to homosexual conduct between consenting adults in private defended Devlin's 'disintegration thesis', arguing that to permit such behaviour would inevitably lead to a moral declension which would undermine the fabric of society. Advocates of reform on the other hand, tended to subscribe to Hart's position, questioning the grounds on which moral feeling about homosexuality was founded. Numerous examples of these arguments have appeared in the text and do not warrant repetition here. Suffice to say though, that the issue of homosexuality is another case where recognition has to be given to the different 'values' and different frames of reference that arose in determining policy.

When comparisons are drawn between Scotland and England there are not many differences to be found in the general principles of the respective enactments. As in the case of divorce, the same considerations applied: should Scotland be content to 'catch up' and draw itself into line with prevailing practice in England or should it consider alternative policies to meet its own particular current and future requirements? Glimpses of alternative policies did appear, for example, in the proposal to reduce the age of consent to the heterosexual norm of 16, but in the end the 'standardisation' approach prevailed, probably because homosexuality is not a subject which most MPs feel inclined to be radical about.

The glaring difference between the reforms, of course, was that they were thirteen years apart. Certainly in Abse's case parliamentary opinion was more definitely formed on the issue and once he could demonstrate support he was able to extract parliamentary time from a sympathetic administration. To recall Roy Jenkins' defence of this allocation of time:

'Had we not taken this course, we should have found ourselves faced with the anomaly that the sanction of the criminal law continued to apply to acts which Parliament no longer considered to be criminal and that solely because of the hazards of the Private Members' Bill procedure the law could not be changed'.

However, to all intents and purposes that was the situation which prevailed in Scotland throughout the seventies. The ultimate irony was that while the anomaly was used to justify parliamentary time for reform south of the border, in the Scots instance that very anomaly (an extant criminal statute but a policy of 'no prosecutions') was subsequently used to deny the need for reform and to justify what was tantamount to a 'non-decision'.

Once again then, the 'Scottish dimension' in this case study lies in all of the aforementioned points. It lies in what might be described as the politics of a 'non-issue'. Lack of general public interest, lack of any widespread pressure group activity (with the exception of the SMG), lack of attention from most Scots MPs, lack of a suitable parliamentary opportunity for reform and lack of any urgency due to the Lord Advocate's policy of 'no prosecutions', all contributed towards homosexual law reform being perceived in Scotland during the 1970s as a 'non-issue'.

1. Criminal Law Amendment Act 1885, (48 + 49 Vict. Ch. 69).
2. *ibid.*
3. Peter G. Richards, *Parliament and Conscience*, London, Allen and Unwin, 1970, p. 64.
4. *ibid.*, p. 66.
5. H. of C. Parl. Deb., Vol. 526, col. 1752.
6. H. of L. Parl. Deb. Vol. 187, col. 737.
7. *ibid.*, col. 739.
8. *ibid.*, col. 744.
9. *ibid.*, col. 755.
10. *ibid.*, col. 760.
11. *ibid.*, col. 763.
12. Report of the Committee of Homosexual Offences and Prostitution (Wolfenden Report), HMSO 1957, Cmd 247, p. 7.
13. Richards, *op. cit.*, p. 70.
14. *ibid.*, p. 68.
15. Wolfenden Report, p. 9.
16. *ibid.*, p. 9/10.
17. *ibid.*, p. 21.
18. *ibid.*, p. 24.
19. *ibid.*, p. 50.
20. *ibid.*, p. 18.
21. *ibid.*, p. 119.
22. *ibid.*, p. 121.
23. Richards, *op. cit.*, p. 71.
24. Report of the Committee on Church and Nation to the General Assembly of the Church of Scotland, May 1958, p. 1.
25. *ibid.*, p. 4/5.
26. Deliverance of the General Assembly of the Church of Scotland 1958.
27. H. of L. Parl. Deb., Vol. 206, col. 753.
28. *ibid.*, col. 797.
29. *ibid.*, col. 811.
30. *ibid.*, col. 773.
31. H. of C. Parl. Deb., Vol. 596, col. 388.
32. *ibid.*, col. 411.
33. *ibid.*, col. 416.
34. *ibid.*, col. 437.
35. *ibid.*, col. 438.

36. *ibid.*, col. 465.
37. *ibid.*, col. 370.
38. H. of C. Parl. Deb., Vol. 625, col. 1468.
39. *ibid.*, col. 1474.
40. Leo Abse, Private Member, London, MacDonald, 1973, p. 146.
41. *ibid.*, p. 148.
42. Richards, *op. cit.*, p. 74.
43. H. of L. Parl. Deb., Vol. 266, col. 124.
44. *ibid.*, col. 82, The Archbishop of Canterbury.
45. *ibid.*, col. 102.
46. *ibid.*, col. 131.
47. Abse, *op. cit.*, p. 149.
48. H. of C. Parl. Deb., Vol. 724, col. 803.
49. *ibid.*, col. 829.
50. *ibid.*, col. 833.
51. Abse, *op. cit.*, p. 152.
52. *ibid.*, p. 152.
53. H. of C. Parl. Deb., Vol. 738, col. 1070.
54. Abse, *op. cit.*, p. 153.
55. H. of C. Parl. Deb., Vol. 738, col. 1134.
56. *ibid.*, col. 1135.
57. *ibid.*, col. 1139.
58. Abse, *op. cit.* p. 157.
59. The Times, 24th June, 1967.
60. Abse, *op. cit.*, p. 158.
61. Richards, *op. cit.*, p. 82.
62. Abse, *op. cit.*, p. 151.
63. H. of C. Parl. Deb., Vol. 989, col. 298.
64. Interview with Leo Abse MP, 26th March 1981.
65. Report of the General Assembly of the Church of Scotland 1966,
p. 459.
66. Report of the Social and Moral Welfare Board to the General
Assembly 1967.
67. Deliverance of the General Assembly of the Church of Scotland on
the Report by the Committee on Moral Welfare, May 1967.
68. The Times, 25th May 1967.
69. H. of L. Parl. Deb., Vol. 284, col. 1297.
70. *ibid.*, col. 1289.

71. Working Party of the Moral Welfare Committee, Memorandum on
The Church and the Homosexual, 1968, p. 2.
72. *ibid.*, p. 2.
73. Deliverance of the General Assembly of the Church of Scotland
on the Report by the Committee on Moral Welfare, May 1968.
74. Extract from a Prayer Letter by E. R. Shackleton, 16th September
1967.
75. Rev. L. D. Levison, Edited Version of Speech, 15th September 1973.
76. Interview with Ian Dunn, Secretary of the Scottish Homosexual
Rights Group, 26th January 1981.
77. *ibid.*
78. *ibid.*
79. *ibid.*
80. H. of C. Parl. Deb., Vol. 918, col. 138.
81. *ibid.*, col. 1571.
82. *ibid.*, col. 1581.
83. *ibid.*, col. 1577.
84. H. of L. Parl. Deb. Vol. 383, col. 170.
85. *ibid.*, col. 192.
86. H. of C. Parl. Deb., Vol. 989, col. 286.
87. *ibid.*, col. 299.
88. *ibid.*, col. 303.
89. *ibid.*, col. 309.
90. *ibid.*, col. 310-12.
91. *ibid.*, col. 316.
92. *ibid.*, col. 316.
93. H. of L. Parl. Deb., Vol. 413, col. 1816.
94. *ibid.*, col. 1823.
95. *ibid.*, col. 1836.
96. *ibid.*, col. 1834.
97. *ibid.*, col. 1839.
98. *ibid.*, col. 1841.
99. *ibid.*, col. 1852.
100. *ibid.*, col. 1856.
101. Interview with Donald Dewar MP, 25th March 1981.
102. Interview with Dennis Canavan MP, 24th November 1980.
103. Interview with Harry Ewing MP, 26th November 1980.
104. Interview with Robert Hughes MP, 24th November 1980.

105. Interview with Malcolm Rifkind MP, 16th March 1981.
106. Interview with Neil Carmichael MP, 25th March 1981.
107. Interview with Robin Cook MP, 27th February 1981.
108. Harry Ewing, *op. cit.*
109. Neil Carmichael, *op. cit.*
110. Robert Hughes, *op. cit.*
111. Interview with Bruce Millan MP, 26th March 1981.
112. Interview with Mr. Menzies Campbell, 14th January 1981.
113. Robin Cook, *op. cit.*
114. Dennis Canavan, *op. cit.*

CHAPTER 10

CONCLUSION

I.

The aim of this thesis has been to examine the politics of Scottish law reform in an attempt to establish what, if anything, constituted the 'Scottish dimension' in the particular 'issues of conscience' - liquor licensing, divorce and homosexuality - which have been under consideration. Through an enquiry into Parliament and the policy process attention has been focused on various aspects of Scottish affairs in the 1970s. For instance, in each of the measures discussed MPs were free to vote according to individual conscience rather than by party whip. Hence they have provided an interesting insight into some of the social attitudes which prevailed in Scottish politics. They have also provided the means to explore in the Scottish context, variations in policy content and variations in the processes by which policy is formulated.

The scope of the thesis has been wide in so far as it has sought to investigate some key concerns about decision-making and policy-development in Scottish affairs in different cases and at different levels. In so doing a number of common questions, issues and themes have been raised in the discussion. The purpose of this concluding chapter is to draw these various themes together by making an overall assessment of how the case studies, and the conclusions to the case studies, can be brought to bear on some of the general issues raised in Chapter 1, 2 and 3. In order that the thesis might end with a statement on the 'Scottish dimension' in this particular sphere of politics, it is proposed here to deal with the matters raised in Chapters 1, 2 and 3 in reverse order. Thus, the following section (Section II) will consider the case studies in relation to Parliament

and procedure, Section III will consider them in relation to approaches to policy making and Section IV in relation to Scottish culture and politics.

II.

In Chapter 3 some of the differing conceptions of Parliament's role in policy making were discussed and some case examples outlined. There emerged from that discussion two principal points of view - one which might be described as the 'Ashford thesis' and the other which can be termed the 'Norton thesis'. It was against these two analyses that some of the Parliamentary aspects of the case studies were to be considered.

The 'Ashford thesis', it will be recalled, was the predominant one. It emphasised the primacy of the Executive and its bureaucracy in the formulation of policy. The increased complexity of the structure of government, especially in the twentieth century, had led to the decline in the importance of direct democratic control through Parliament. It postulated that the Opposition had relatively few ways to intervene in lawmaking and policy choices and that even the supporters of the governing majority in Parliament were themselves excluded from policymaking to a remarkable degree.

The 'Norton thesis', on the other hand, questioned the notion that the initiation and formulation of legislation were largely, if not almost exclusively, undertaken by Government. While it did not deny that this was a reasonably accurate description of policy-making until the end of the 1960s, the thesis doubted its continued relevance to the analysis of policy formulation in the 1970s and early 1980s. Instead, the 'Norton view' pointed to the pattern of parliamentary behaviour in the 1970s which revealed that MPs had been more willing

to dissent from the Government line than had previously been the case. Thus, it was suggested that Parliament retained a basic power to vote against Government proposals if a majority disagreed. This was not merely a potential power but an actual power which MPs had already proved capable of using. Parliament did have a role in policy-making but it was up to the MPs themselves to put into effect the powers of scrutiny and influence already available.

What then, do our case studies on Scottish issues of conscience reveal about these analyses? What do they say about the role of Parliament? Before any general response is possible, a look at some of the more specific aspects of Parliament in relation to the case studies is required.

The Scottish Grand Committee plays an important part in Scottish affairs in Parliament. This comprises all 71 Scottish MPs. Until 1979 it also used to include additional (and usually unwilling) English MPs who were co-opted onto the Committee in order to preserve the party balance which prevailed on the Floor of the House. It was a practice used mainly by the Conservatives to overcome Labour's constant majority in Scotland.

Now the Committee has been given something of a peripatetic role, sitting in both London and Edinburgh. In the aftermath of devolution this was the Thatcher Administration's offering to the Scottish people of more accountable government. Along with the re-instatement of a Select Committee on Scottish Affairs, which itself was a part of the Government's general reorganisation of the Select Committee system, it was presented by the Conservative Government as an opportunity for Scots to witness at first hand 'Parliament at work'. Critics however, within the Labour, Liberal and Scottish National parties viewed it as something of a red herring since it was only a deliberative body with

no independent legislative powers.

Throughout the seventies however, the Scottish Grand Committee resided at Westminster. There it dealt mainly with two types of business - Second Reading debates on the principles of Bills pertaining solely to Scotland and more general debates on Scottish issues of current interest. Both these functions were fulfilled in our case study on liquor licensing. Initially, the SGC provided the forum to debate the general principles and implications of the Clayson Report. Here it not only provided the means through which Scottish parliamentary opinion could be expressed, it also helped to maintain interest in the issue. This debating facility can be of considerable importance to Scottish issues which might otherwise be neglected and it was certainly a distinct advantage in the case of licensing. Such a facility does not exist for England and Wales though, since there is no equivalent to the SGC. So while it is possible for Scottish Reports like Clayson to be discussed in Parliament in Committee, it is much more difficult for similar English (or indeed British) Reports to receive parliamentary attention because they have to compete for time on the Floor of the House of Commons itself. With such time at a premium it is only Reports of the very highest importance which can command a full debate. Perhaps this is another reason why so many Reports receive scant public attention.

When the Licensing (Scotland) Bill came before Parliament in 1975 the SGC was again used, this time for a Second Reading debate on the principle of the Bill. If a Bill is declared to pertain solely to Scotland it can be removed from the Floor of the House and debated in the Grand Committee. Since such a Bill then proceeds to one of the Scottish Standing Committees, it is not until Report and Third Reading that it comes to the Floor of the Commons. This can have some

interesting repercussions as the Licensing issue demonstrated.

At the Report Stage of the Licensing (Scotland) Bill, the Secretary of State for Scotland, Bruce Millan, more or less warned English MPs not to 'interfere' in the vote on Sunday opening. While this was admittedly done in a rather oblique manner, it did nevertheless illustrate a problem that can arise if English MPs decide to vote on issues which pertain solely to Scotland. The fear amongst Scottish Members is that a Scottish majority can be overruled by the weight of English opinion. It is not only free vote issues which are susceptible to this problem. For instance, there exists a permanent difficulty for Conservative administrations when Scotland returns a majority of Labour MPs but the United Kingdom as a whole returns a majority of Tories. In face of whipped Labour opposition Conservative governments have, by necessity, to call upon their English MPs in order to secure a majority on purely Scottish matters. If they did not, Tory governments would have great difficulty in passing any Scottish legislation at all.

Of course, the other side of the coin is the problem of Scottish MPs voting on matters of concern only to England and Wales since it is also possible here for Scottish Members to have a decisive effect on the outcome in such cases. In the 1970s the issue of Scots MPs voting on matters of concern only to England was to become something of a 'cause celebre' to some anti-devolution MPs. They considered it unfair that after devolution Scots Members would retain the right to influence affairs particular to England but that the reciprocal right of English MPs to have their say on Scottish affairs would be removed by the presence of a Scottish Assembly. This, because it was publicised so much by Tam Dalyell, became known as the 'West Lothian question'. The role of Scottish MPs at Westminster then, was a prime

concern in the devolution debate in the seventies. The issue at stake was one of equity; what constituted an equitable arrangement for the handling of Scottish affairs. It is this question of equity which the case studies on Scottish issues of conscience have tried to explore.

One idea which has been suggested to improve the handling of Scottish business in Parliament, by David Steel among others, is that the Scottish Grand Committee should take the Report Stage of Scottish Bills with only a final reserve power (say, at Third Reading) left to the House. The advantages of this, it is argued, would be twofold. Firstly, pressures on the legislative timetable of the Floor of the House would be eased, and secondly, the decisions reached in the SGC would reflect Scottish parliamentary opinion since they would not be subject to opinions of any English Members.

Such a scheme, however, would not be without its problems. There would be party political objections for a start. As noted above a Conservative Government would have great difficulty in securing the passage of any contentious legislation in the face of Labour's majority in Scotland. The Conservatives could of course pack the Committee with English Tories to restore an overall majority, but this would defeat the purpose of a 'Scottish only' debate. So in practice the scheme would only be feasible when there was both a Labour majority in Scotland and in the UK as a whole (or indeed a Conservative majority in both instances, but this is not as likely). Also there would be technical difficulties in setting the criteria for the final reserve powers of the House. For instance, in what circumstances would it be acceptable for the House to veto a decision made in the SGC and in what circumstances would this be tantamount to unnecessary interference in Scottish affairs?

These then, are formidable objections to the general use of the Scottish Grand Committee for Report Stage debates. But what about its more limited use for free vote issues relating only to Scotland? This is an altogether different matter since the same party political objections could not be brought and technical difficulties could be overcome if it was accepted that, generally speaking, Scottish opinion on such moral matters should prevail. However, the issue is complicated when it is realised that these moral concerns are usually the subject of Private Members' business and even for Scottish 'issues of conscience' the SGC does not at present have a procedural role. Might it be possible though, to give it a role?

It has been emphasised throughout the thesis that one of the biggest obstacles facing Private Members' legislation is adequate time for debate. At both Second Reading and Report Stage, Private Members' Bills can face bottlenecks and delays. Now hypothetically, if Private Members' Bills pertaining solely to Scotland were to be heard at Second Reading and/or on Report in the Scottish Grand Committee, then aggrieved English Members might justly object that Scotland would be receiving an unfair advantage since English Bills would continue to languish in the queue for time on a Friday afternoon. On grounds of equity then, such a scheme would appear to be a non-starter, unless perhaps more fundamental reforms to Private Members' procedure were contemplated, such as the creation of a separate Scottish Ballot.

Had, of course, the Scotland Act 1978 been implemented and a Scottish Assembly established, the Scottish Grand Committee would now be obsolete. It would no longer have any useful function at Westminster since matters relating solely to Scotland (at least as defined in that 1978 Act) would be the responsibility of the Assembly. How an Assembly might have handled the topics considered in this thesis and other

Scottish issues is a matter open to conjecture because the Scotland Act never set out any definite procedural guidelines for it to follow. These details were to be worked out by the Assembly itself once it was elected and under way. However, it would be reasonable to assume that some suitable method for dealing with free vote issues, say through a Ballot, would have been incorporated into Assembly procedure. The possible role of an Assembly in Scottish affairs is a matter to which Section IV will return.

The question which requires to be asked here though, is how useful the Scottish Grand Committee is in dealing with Scottish affairs. One thing that can be stated categorically is that even with its present peripatetic role, the SGC cannot be viewed as any substitute for devolution. The Scottish Grand Committee has nowhere near the same standing as an Assembly. It commands neither the power, status or public interest of devolution. Yet, within the existing parliamentary structure it is the only forum available to Scottish Members to debate Scottish issues. In the case study on liquor licensing it was seen how the SGC played a useful part in bringing the Clayson Report onto the agenda for consideration and in assisting with the passage of the Licensing Bill founded upon Clayson's recommendations. So while Parliament remains structured along its present lines, the Scottish Grand Committee will continue to be an important deliberative forum in which Scottish issues can be considered by Scots MPs.

Another aspect of Parliament which featured prominently in the case studies was the procedure for Private Members' legislation. Here some of the problems which were encountered will be considered in order to see what they might reveal about Parliament and Private Members' Bills. What were the problems common to all MPs and what were the problems that might have been particular to Scots MPs?

An initial problem can lie in getting an issue onto the agenda and a prime target for criticism in this respect is the Ballot. It has been criticised for being too much of a lottery, for providing only those with a sufficiently high place with time for debate, and for paying scant regard to the relative importance of different issues. These disadvantages though, faced all MPs, so what were the particular difficulties encountered by Scottish Members?

In the course of the studies several Scottish MPs were found to have expressed dissatisfaction with Private Members' procedure, especially with the Ballot which they felt placed Scots Members at something of a numerical disadvantage in the draw. The prevailing perception seemed to be that the statistical chances of getting a Scots MP drawn high in the Ballot and then getting him to adopt a Scots Bill were poor. These assumptions, however, are only partially true.

An analysis of Private Members' Ballots from 1966 to 1980 (see Appendix I) revealed that of the 336 places available, Scottish Members won a total of 42. This represented a 12.5% share of the Ballot places available during these years. Now since Scotland's 71 MPs represent 11.2% of all Members sitting in Parliament, Scottish Members appear to have won a marginally greater percentage of places in the Ballot than their parliamentary membership. Thus, the widely held belief that the Scots are disadvantaged in the draw is not in fact true.

However, this takes no account of the position attained in the Ballot, or the type of Bill sponsored. The analysis further revealed that of the 42 Scots MPs, 23 chose to sponsor a UK Bill while 19 opted for a Scottish one. This does not represent a drastic imbalance. But of the 21 Scots MPs who were drawn in the first eight places (and by implication stood a realistic chance of success) only 6 chose to present a Bill pertaining solely to Scotland. Therefore the assumption

that it can be a problem to get a Scots MP drawn high in the Ballot *and then to sponsor a Scottish Bill* seems much nearer the truth.

This though, would appear to say more about the attitudes of Scots MPs than about the Ballot itself. It is perhaps unjust to lay the entire blame on the vagaries of the Ballot when Scottish Members themselves have not taken up the opportunities available to present Scottish Bills. Obviously, the reasons why particular MPs chose to sponsor particular issues vary in each case, but it does appear as if Scottish MPs consider it important to retain the option to sponsor non-Scottish Bills. Indeed, this is one of the main arguments used against the idea of a separate Ballot for Scottish MPs. For although a separate Scottish Ballot would guarantee a Scots MP a place, it would then be incumbent upon him to sponsor a Scottish Bill. If he did not it would defeat the purpose of such a draw since the idea behind it is to get Scottish issues, not Scottish MPs, onto the political agenda.

Apart from any technical difficulties of establishing what might constitute an equitable amount of time for Scottish Private Members' legislation, Scots MPs would be reluctant to be railroaded into presenting only Scottish Bills. Keating has pointed out that Scots MPs operate in a dual arena - in the Scottish context and in the UK context. He has shown that while most Scots MPs look to Scottish affairs as their primary concern, and seek to gain as much control as possible over these affairs, they also look to maximise their influence over matters of concern to Britain as a whole. This certainly seems to hold true for Private Members' legislation where Scots MPs feel it important to retain the right to introduce British measures.

Another obstacle which can confront MPs bringing forward Private Members' Bills is the problem of getting a decision at Second Reading. The sponsor of a Bill can often experience difficulty in bringing the

debate to a close and forcing a vote. In order to overcome the filibustering obstructionism of his opponents he must obtain a 'Closure Motion' if the Bill is to make any further progress. Now this obstacle is common to all MPs but there are certain specific problems for Scots MPs.

The promoter of the Bill (or indeed anyone else) can move the closure by proposing 'that the Question be now put', but he can succeed in this only if two conditions are fulfilled. The Speaker must be satisfied that the Bill has been adequately debated, and at least 100 Members must vote for the closure. On Robert Hughes' Divorce Reform Bill it was seen that although there was a majority of 71 to 15 in favour, 'the question was not decided in the affirmative' because it fell short of the required 100 votes. While every MP faces a difficulty with this, the Scots MP has a particularly high hurdle to surmount since he must deliver 100 votes from a Scottish Membership which stands at only 71 MPs. He therefore becomes totally reliant on the assistance of his English colleagues with all the attendant problems of maintaining their interest in a Scottish issue on a Friday afternoon. So as Robin Cook has pointed out, 'this rule is a real pitfall for the Scottish Private Member'.¹

One of the ironies in the Private Members' procedure is that if a Scottish Bill can manage to overcome the hurdle of Second Reading it can then have a distinct advantage over other Bills. This is because it is possible for Private Members' Bills which relate exclusively to Scotland to be considered separately by one of the Scottish Standing Committees instead of having to queue up for consideration along with the United Kingdom Bills. Scottish Bills then, can proceed faster to Standing Committee than can United Kingdom Bills. This is not to say that they will necessarily proceed faster *through* Committee,

but certainly having a head start is no disadvantage. The paradox, then, would seem to be that once on the legislative agenda and under way, it is possible for a Scottish Bill to progress more quickly than other Bills, but the difficulty is getting it onto the agenda for consideration in the first place.

The attitude of the Government, of course, can be of critical importance to the success or failure of a Private Member's Bill. This was amply demonstrated in the case studies where there were numerous examples of Bills which were assisted with time and Bills which were not. There appears to be no definite criteria by which a Government decides whether generosity is warranted. While each case is judged on its merits some general considerations have emerged which can influence a Government's response. These include the state of the Government's own programme, the progress and prospects of the Bill in Private Members' own time, and the amount of interest in and support for the measure. At this point then, attention will be turned to consider what the cases might reveal about the role of public opinion and the role of MPs in influencing policy in Parliament.

By their nature, issues of conscience generate divergent opinions. This however, creates problems in defining and identifying what majority opinion might be. The Scottish divorce issue illustrated this point particularly well. In this case MPs' perceptions of public opinion depended a great deal on their own values and beliefs and on who or what they took to represent public opinion. There was a similar situation with homosexuality where, because of the nature of the subject, public opinion was, for the most part, reserved and subdued. Lacking a firm reference point on public feeling, MPs tended to rely on their own values, and in some instances prejudices, in their evaluation of the matter. Only in licensing was prevailing opinion more

clearly defined and this stemmed largely from the Clayson Committee of inquiry which distilled the range of views submitted to it into coherent categories. When the Committee came out in favour of relaxations in the law, its recommendations were taken up and pushed by sections of the Scottish press, and this did much to solidify public support for reform. Also since drink has such a prominent place in the Scottish psyche, it was an issue which readily caught public interest.

Even when a clear cut majority in opinion can be identified, its influence on policy in Parliament is still rather uncertain. Take for instance the issue of capital punishment. It is generally acknowledged that at the time of its abolition, hanging was supported by a majority of the populace, and periodic opinion polls since have indicated that a majority of the British public would not be averse to the reintroduction of the death penalty for certain categories of murder. Yet MPs have consistently refused to be influenced by this expression of popular sentiment, preferring instead that Parliament should be seen to lead, not follow, opinion on this issue. On other issues though, like divorce and homosexuality, Parliament prefers, and often insists, that it should follow.

This is one of the central themes of the Devlin/Hart controversy. The implication of the Devlin argument is that Parliament should be more or less obliged to follow popular feeling on such moral issues, since it is the viewpoint of the 'man on the Clapham omnibus' which has to be upheld. Hart, on the other hand, would suggest that Parliament has to be free to view the general moral feeling not only with a sympathetic understanding but also with a 'critical intelligence'. However, this begs the question, who is the man on the Clapham omnibus and what is the general moral feeling?

The case studies have demonstrated some of the problems in identifying public opinion. It has been suggested that opinion is made up of a number of component parts, the relative importance of which can vary over time and over issues. This creates difficulties in establishing what the general impact of public opinion might be. It is possible, as the cases have shown, to point to certain aspects of public opinion, e.g. pressure group activity or media exposure, which appear to have been influential at a given point in time and on a given issue. But whether Parliament is leading or following public opinion is difficult to assess without some objective data about that opinion and change in it over time.

Of course one of the aims of the thesis has been to examine any differences between Scottish opinion and English opinion. This has proved difficult because there is little firm evidence such as independent Scottish opinion polls on these issues which might reveal variations between the two countries. Thus, it was relatively easy for Scots MPs to invoke whichever part of public opinion most suited their particular viewpoint. Other aspects of Scottish opinion and morality will be returned to in Section IV.

The way in which MPs assessed public opinion was another important feature of the case studies. A number of influences were found to affect an MP's appraisal of opinion, such as mailbags, constituency pressure, the press, pressure groups, public meetings and surgeries, and informal social gatherings. Each of these influences affected individual MPs differently, but the one common feature which could be identified was that MPs tended to play up those sources which reinforced their personal biases, while playing down those at variance with them. The case studies threw up numerous examples of this where MPs drew upon and quoted that section of public opinion which did most to

support their personal predilections. Thus, the way in which public opinion was assessed and presented by MPs was very dependent on their own values and beliefs.

In each of the case studies then, the role of the individual MP was of considerable importance. In licensing, for instance, the influence of J. P. Mackintosh in setting the tone of the debate was noted, and in particular decisions, such as the Sunday opening of pubs and the restriction of police entry to clubs, the names of Malcolm Rifkind, Dennis Canavan and Michael Clark Hutchison came to attention. The divorce issue also produced its share of influential individual contributions on both sides of the argument from Donald Dewar, Robert Hughes, Willie Hamilton, Robin Cook and Tam Galbraith. And the homosexuality issue again saw Robin Cook, along with Lord Boothby and the Earl of Arran, make significant contributions by periodically speaking out in favour of a legislative reform.

In our case studies Parliament and individual MPs have had a rather more important role to play in deciding policy options than the 'rubber stamp' role with which they are usually associated. In this regard the studies, being both issues of conscience and issues of the 1970s, tend to support Norton's view that Parliament is not always impotent in influencing policy outcomes. The innovative roles of Robin Cook and Leo Abse are particularly good examples of Norton's idea that channels of influence already exist within Parliament, but that these channels are only effective if MPs show themselves willing (and knowledgeable enough) to use them.

However, even Norton concedes that Parliament has ceased to form a regular part of the decision-making process. Ashford's thesis then, is not necessarily refuted by these instances. They could be incorporated into his analysis as reasonable exceptions. What Norton's

thesis demonstrates is that the Opposition in the seventies, because of the changing balance of power, had a greater opportunity to intervene in lawmaking and policy choices. In other words through dissent Government action could be *prevented*. What our cases have shown are some of the difficulties involved when Parliament tries to *initiate* policy change or legislation in face of a reluctant Executive. So it would appear as though the power of veto comes more readily to Parliament than the power of initiative. Yet, however limited it may be, Parliament did exert and does still exert some influence in the decision-making process. As Norton has stated, 'the House of Commons certainly cannot be written off as irrelevant'.²

III.

Chapter 2 reviewed some approaches to policy analysis and it was suggested there that more than one account was required to describe all the different aspects of policy-making and organisational life. No one clear and simple explanation of policy development in modern government was thought to be possible; therefore the idea of a single 'policy process' operating identically throughout an individual policy change or over all policies was cast aside. Instead it was the balance of forces which operated in different phases of the process and in different types of policies that required illumination.

If then, there is no single policy process, how is the emergence of policies to be conceptualised and how might our policy studies fit into this conceptualisation? Here this part of the conclusion will progress towards a statement on the utility of the notion of a continuum in which to allow for differentiation of different types of policies.

One of the ideas that the case studies have amply illustrated is that the making of policy is both an intellectual activity and an

institutional process. All three cases have shown that decisions which influenced policy were the products of individual minds which perceived and defined problems and created new policies on the basis of those perceptions. Yet policy formulation was also an institutional process whereby policy-makers derived authority from, and had to operate within, the political institutions of which they were a part. The cases of divorce and homosexuality in particular have demonstrated that while policy did alter as a response to changing intellectual appraisal, institutional realities also affected the extent to which new ideas penetrated the political world and upon the way in which they were assimilated into public policy. Take as just one example of this, the premium on parliamentary time for debating Private Members' initiatives.

This interaction between intellectual activity and institutional process underpins the rationalist/incrementalist debate. It was observed in Chapter 2 that rationalism promoted a systematic and orderly (and by implication, intellectual) approach to the study of policy problems. Through a sequence of rational activities - identification of problem and objectives; classification of possible options; consideration of the consequences of those options; and comparison of options and consequences with original objectives - a policy could be selected in which consequences most closely matched the desired objectives. Incrementalism, on the other hand, started not with some ideal goal, but with the policies currently in force and decision-making here entailed considering only marginal change. The policy-maker chose as relevant objectives only those which might be achieved through means actually at hand or likely to become available (e.g. institutional process). Evaluation was not viewed as a separate activity but as taking place in series with decision-making, so that means were not

only adjusted to ends, but also ends to means. How then, do these differing conceptions of policy formulation fit with the case studies? What is their explanatory value? Do issues of conscience, by their nature, necessitate an incrementalist policy response?

The answer, and it is equivocal, is that in each of the cases under consideration there has been both a rational (of sorts) and an incremental response to the perceived problems of licensing, divorce and homosexuality. At some juncture in each case there was what might be described as a 'rational' initiative to set up committees of inquiry to review the problem. However, these Committees varied in approach as did the quality and impact of their Reports. The Clayson Committee on licensing and the Wolfenden Commission on homosexuality came closest to adopting a 'rationalist' perspective by identifying problems and objectives, reviewing possible options and consequences, and making policy recommendations accordingly. In contrast, the Morton Commission on divorce lacked any such clear 'rationalist' objectives and tended to prevaricate over its recommendations.

After each of the Committees reported, policy development tended to proceed in an incremental fashion. Options which were perhaps regarded as desirable had to be weighed against those regarded as feasible. Both politicians and public opinion can place limitations upon what is politically possible. Thus, not only were means adjusted to ends, but ends became adjusted to available means. Change was tempered to suit what was thought to be commonly acceptable. For example, in the case of homosexuality the reduction of the age of consent to 16 for consenting adults in private was deemed unacceptable; in divorce the all-embracing principle of a two year period of breakdown with or without consent was deemed unacceptable; and in licensing all-day opening was deemed unacceptable. In each of these examples the changes in

policy eventually approved were more marginal and 'incremental' in nature than those originally advocated.

To some extent the cases have illustrated the artificiality of the rationalist/incrementalist debate which tends to confuse ideal with real states of affairs. Rationalism is held as an ideal image of decision-making and one to which, for instance, committees of inquiry try to aspire. The reality though, is often different as extraneous factors can impinge upon such rationalist attempts compromising both options and objectives. So incrementalism has much validity as an empirical model of how policies develop. As Smith and May point out the two models are about different social phenomena. The problem, therefore, is not to reconcile the differences between them, but to relate the two in the sense of 'spelling out the relationship between the social realities with which each is concerned'.³ In each of the cases then, attempts at a rationalist overview gave way to a more protracted incremental approach.

One factor which affected rational policy making was pressure group activity. Richardson and Jordan have in fact gone as far as to contend that such is the power of pressure groups in contemporary society that we are now living in a 'post-parliamentary democracy'. In the preceding section, however, it was suggested that Parliament was not as weak as was sometimes imagined since it still retained some basic powers through which it could influence the decision-making process. Nevertheless, pressure groups are still an important element in influencing policy. So what did the cases reveal about pressure group politics?

The most important and influential pressure groups in each study have already been recorded and commented upon in the individual conclusions to the cases. Some repetition though is warranted here so

that more general comparisons can be drawn.

Amongst the most influential organisations that one might expect to find on issues of conscience would be the Christian churches. Yet overall their impact on the cases in question was rather diffuse. A general decline in religious belief and church attendance can be held partly responsible for this, as can divisions within the Christian faith and divisions within particular denominations.⁴ But more than this there appeared to be a lacklustre performance from the Scottish churches in their capacity as pressure groups. There was a lack, particularly in the Church of Scotland, of what might be called political acumen. After the approval of a policy by the General Assembly there was then little, if any, secular activity from the Church of Scotland in the way of lobbying. And what lobbying there was often came too late.

Further, it is interesting to contrast the differences between the Church of Scotland and the Roman Catholic Church in Scotland on these issues. In each case they held different positions, sometimes quite markedly so. Their views perhaps came closest to converging on the homosexuality question where both churches advocated increased understanding of, and pastoral care for, homosexuals. However, while the Church of Scotland came out tentatively in favour of law reform, the Catholic Church was reluctant to do the same lest it be misconstrued as in some way condoning the practice. On the other two issues there was an even greater divergence in points of view. While the Catholic Church approved and supported the liberalisation of the licensing laws, the Church of Scotland were vehemently opposed to any relaxations especially on a Sunday. The reverse, however, was true for divorce, where the Kirk took up a very radical position in favour of reform, while the Catholic hierarchy opposed change. With such a

divergence of Christian opinion in Scotland is there any wonder that it lacked political impact?

Medical opinion too was strangely equivocal, although this was only really relevant to the licensing issue. None of the medical bodies felt confident about substantiating an opinion on the effect of licensing laws on the misuse of alcohol due to a lack of reliable evidence. With this uncertainty their impact on policy was also less than one might have expected it to be.

Only the legal profession was consistent in its support for the principle of reform in all three cases. Even here though there were skirmishes in the ranks between the Law Society of Scotland and the Faculty of Advocates over the proposed hearing of divorce cases in the Sheriff Courts. Their role in influencing policy, however, was passive rather than active. They tended to react to demands for legal advice on the reforms rather than create the demand for the reforms themselves.

Hall et al. have rightly pointed out that pressure groups do not each relate to government in isolation. Their interests and objectives can overlap, compete with and stand in opposition to each other. In none of the studies though, were there any examples of formal group alliances, although the Scottish Licensed Trade Association and the Scottish Tourist Board certainly did work in close co-operation in the early seventies in campaigning for the reform of the licensing laws. On the other hand there were numerous examples of groups standing in opposition to each other. The deep divisions between the Scottish churches on all of the issues have been noted. In licensing reform there were divisions not only between the temperance lobby and the licensed trade, but also within the 'trade' itself, where there was a divergence of opinion between the Brewers' Association of Scotland and the National Association of Licensed House Managers over the

effects of extra hours on the working conditions of bar staff. In divorce too, there were divisions between organisations ostensibly on the same side, in as much as the Scottish Law Commission and the Church of Scotland, while both favouring reform, could not reach agreement on the contents of a reform Bill.

The effect of group alliances, or alternatively group competition, on policy formulation will obviously vary according to particular circumstances. But clearly where groups 'on the same side' and in broad sympathy with a general principle cannot come to a compromise solution on matters of detail in order that they may present a united front, then their influence on policy will be diminished, while the influence of decision-makers will be augmented. For as Hall et al. noted, in competing for influence groups may neutralise each other which can give political leaders the opportunity to select and manipulate the interests to which they ultimately respond.

Another factor which can have an effect on a group's influence is the way in which its demands are presented. Richards has pointed out that for opinion to matter it must be reasonably specific and be expressed by persons of authority. And he adds, 'authority may derive from status or knowledge'.⁵ There were certainly a number of examples in the studies which confirmed the general truth of this observation. In the licensing study especially it was seen how consultation was not always equitable, those groups with community 'status' having almost automatic access to decision-makers. Yet access in itself should not be confused with influence for as Dr. Clayson, Chairman of the Committee on Scottish Licensing Law, revealed, some of this consultation 'had to be seen to be done'.

In the case of licensing, pressure group activity was much more observable since formalised lines of communication existed between

groups, the Clayson Committee and the Scottish Office. This was because the issue was the subject of an inquiry and then adopted as a Government Bill. The Licensing (Scotland) Bill was an example of one of those rare political configurations - an unwhipped Government Bill. This meant that there was much more administrative involvement in the preparation and servicing of the Bill than for other issues of conscience which would normally proceed through Private Members' legislation. Of course this is not to imply that Private Members' Bills are totally devoid of administrative back up - the divorce Bills, for instance, were drafted by the Scottish Law Commission. It is simply to suggest that in the cases of divorce and homosexuality there were not as many formal points of access upon which pressure groups could bring influence to bear.

The cases have demonstrated that it is the Government, because of its authority and legitimacy, which ultimately exercises control over pressure groups, through its management of the legislative agenda. The sheer volume of demands, in combination with a shortage of key resources such as parliamentary time, impose upon the Government the need to respond selectively to reduce demands to manageable proportions. And this regulation of demands can be very much dependent upon the values of the legislators and administrators responsible for setting the political agenda.

This was never more evident than in the different case histories of divorce and homosexuality north and south of the border. In England in the late sixties both Roy Jenkins, Home Secretary, and John Silkin, Chief Whip, perceived the issues from a very sympathetic viewpoint which enabled parliamentary time to be found for their debate. In marked contrast the Secretary of State for Scotland at this time, Willie Ross, was totally opposed to any equivalent Scottish

reforms. Crossman's Diaries in fact, have revealed that Ross might have threatened to resign if the case for Scottish divorce reform had been pushed too far.⁶ There is no indication that upon his return as Scottish Secretary in 1974 he had become any more enthusiastic about such matters. And of course, in the interim there had been a Conservative administration which had stated its antipathy to assisting Private Members' legislation of any kind.

Values, then, can affect the way in which the political agenda is set and the way in which the political agenda is set can affect Parliament's influence on an issue. As Schattschneider has noted 'some issues are organised into politics while others are organised out'. Every effort was made to organise the English divorce and homosexual law reforms into politics while a corresponding effort was made to organise any equivalent Scottish reforms out. This was especially true of homosexual law reform in Scotland which for the duration of the 1970s was tantamount to a 'non-decision'. It was not only a case of the issue going through 'some perinatal obscurity',⁷ as Debnam would say, it was also a case of an Executive decree being made through the office of the Lord Advocate that a policy of 'no prosecutions' would be pursued, but the law itself would not be reformed. As McManus has noted,

'This renegotiation of the functions of existing law can take place totally outside the legal forum or, sometimes, inside but at a lower level of visibility than is associated with legislative activity'.⁸

This is what distinguished the Scottish homosexuality issue from the other issues. It involved an administrative action which was designed to pre-empt the need to resort to legislation.

The theme of this part of the conclusion has been that more than one explanation is required to account for all the different aspects

of policy formulation. Each of the approaches identified in Chapter 2 has had some bearing upon at least one of the case studies. With no single 'policy process' applicable it was suggested that the idea of a continuum might have some utility in allowing for the differentiation of different types of policy. So what kind of continuum could be constructed to explain policy development and where would our studies fit on this continuum?

L. J. F. Smith has outlined just such a continuum in her study of the emergence of abortion law.⁹ Much of what she says is readily adaptable to the case studies in this thesis. This continuum is founded on a critical evaluation of the three general models of law emergence - the consensus, conflict and pluralist models.

In the consensus model certain acts are defined as criminal because they offend the moral beliefs of the members of society. The law is seen to represent those values which are regarded as being fundamental to the social order and which it is in the public interest to protect. The main criticism, however, is that it is extremely difficult to point to a monolithic set of values in modern society so why does the law uphold some moral values and not others?

In the conflict model criminal law is seen as a set of rules which emerge as a result of class struggle between those who are 'ruled' and those who 'rule'. The outcome of the struggle is that laws are enforced against those who would try to undermine the position of those who exercise power. The criticism here is that there are in existence laws which apparently curtail the interests and activities of the powerful. Also there is a substantial consensus about some criminal laws.

The pluralist approach suggests that there is a multiplicity of groups in society holding different values and goals and seeking their

recognition in legislation. These groups compete with one another for the attention of the legislature and any alliances which may be formed are dependent on the nature of the specific issue at hand. The criticism though, is that pluralism assumes that groups operate within a value-neutral framework. There is a failure to define what constitutes a social problem or to explain why one area of behaviour, as opposed to another, is viewed as problematic.

Against this background Smith suggests a continuum in which to view law emergence. She contends that each model has been helpful to some extent in furthering our understanding of the emergence of laws, yet each is convincing only in relation to specific types of issues. The consensus model provides the most obvious explanation of law regulating behaviour whose 'criminal' character is not controversial, for example, personal assault. The conflict model aids our understanding of laws regulating activities which involve the power, influence and material interests of a dominant elite. And the pluralist model appears applicable to those issues which lie outwith the direct material concern of a dominant elite such as moral issues which engender deep divisions of opinion.

Each then can provide a framework for interpreting some examples of law emergence but none is successful for all cases. Accordingly, Smith advocates a conceptual scheme which would permit the location of different laws on a continuum, their position being dependent upon which model had most explanatory power for that particular example of law emergence. For the continuum to be constructed certain conditions have to be accepted. Firstly, it has to be accepted that there is considerable consensus on some laws. Secondly, that this consensus is not inconsistent with the existence of a power elite or of a multiplicity of specialised pressure groups, which although party to such

general consensus as exists, are on other points concerned to pursue or sustain their own dominance or to promote issues or causes which are not consensual issues. Thirdly, that groups, however understood, do not necessarily always function cohesively for all purposes and that constituent members may function, for purposes outwith the particular concern of a group, as members of other collectivities. If these caveats are accepted a continuum could be constructed which would allow particular examples of law emergence to be placed along it.

The case studies in this thesis, being issues of conscience, have been characterised by the absence of any identifiable economic elite (although commercial interest, in the shape of the Brewers and the Scottish Tourist Board, and professional interest in the shape of the Faculty of Advocates, was noted in the licensing and divorce issues, respectively). Further, in none of the cases did there exist an overwhelming consensus either supporting or opposing reform of the law. Instead, the emergence of these law reforms was marked by the activities of special interest groups, a divergence in public opinion and the prominence of Parliament and individual MPs. Thus, our studies are best situated in the continuum at the point which is closest to the pluralist model.

IV.

In this final section of the conclusion consideration will be given to those issues arising from Chapter 1 relating to Scottish culture and politics. The aim here will be to proceed towards a statement on the 'Scottish dimension' in our case studies by assessing in what ways Scottish culture and politics came to impinge upon the emergence and development of policy. In other words, how can the idea of Scottish particularity be expressed and summarised?

The Scottish Office, of course, is at the very centre of government in Scotland since it possesses administrative dominance in Scottish affairs. It has, because of this central position, the power to regulate the entry of demands into the 'Scottish political system'. In what way, if any, did this power to regulate affect our case studies?

Notwithstanding Richards' point that in issues of conscience the bureaucracy has less overt control over policy development than in normal government business, the Scottish Office still managed to exert some influence in the early stages of policy initiation simply because of its pivotal role in Scottish politics. In the preceeding section it was noted that while the licensing reform was a free vote issue of conscience it was also a Government Bill which meant Scottish Office involvement in its preparation and drafting. And, of course, prior to that the issue had been the subject of a committee of inquiry appointed under the auspices of the SHHD.

The point which was emphasised earlier by both Kellas and Allen was that this control did not necessarily have to be overt but could be circumstantial and situational in as much as administrative style could influence policy. Kellas suggested that 'a focus for the Scottish ruling elite is to be found in the corridors of St. Andrew's House',¹⁰ while Allen argued that the exclusiveness of the system lay in the 'restriction of influence over decision-making to a small body of fairly senior Civil Servants and MPs, and a large but still modest group of persons regularly consulted'.¹¹

For the most part, the case study on licensing reform tends to substantiate this line of thinking. Both when the Clayson Committee was sitting and when the Licensing Bill was being prepared and enacted, those groups with the highest status in the community benefited most

from the formalised lines of communication with the Scottish Office. For instance, the dialogue between the SHHD and the Association of Chief Police Officers (Scotland) over those points of the licensing law which required police enforcement is just one example. Yet it was noted above that consultation did not always equate with influence. Pressure groups may influence but they do not necessarily determine.

The decision about which issues merited consideration ultimately lay with Scottish Office Ministers and their senior officials since they had the power to select and manipulate the interests to which to respond. The Secretary of State for Scotland in particular is in a powerful position to influence what kinds of issues emerge onto the political agenda for discussion. In the licensing issue there is little doubt that it was the personal influence of Willie Ross which kept the provision for the Sunday opening of pubs out of the original draft of the Licensing Bill. And in the divorce and homosexuality cases his hostility to reform in the late sixties and mid-seventies played a large part in these issues not appearing on the agenda for debate.

Yet, that said, the general influence of the Scottish Office on the divorce and homosexuality issues is not that clear since these cases were bona fide Private Members' Bills and here Richards' point concerning the diminished involvement of the bureaucracy in such matters is more applicable. Certainly there seems to have been no great enthusiasm within the Scottish Office over divorce reform and the periodic official Commons written answer that the Scottish Office would lend drafting assistance to a Divorce Bill if it should obtain the necessary parliamentary time neatly evaded the point that it was the need for parliamentary time which was at issue. And in homosexuality the Scottish Office appeared content not to interfere in the

Crown Office's policy of 'no prosecutions'. However, it does seem as though it was caught on the hop in 1980 when Robin Cook inserted his reform clause into the middle of the Government's Criminal Justice (Scotland) Bill. Since the clause was technically in order the Scottish Office, taken by surprise, had no answer to his ingenuity. On this occasion, at least, its control over the agenda was gently brushed to one side.

The peculiarities of Scotland's historical development within the context of the United Kingdom has been noted by Nairn. It has been characterised by assimilation in politics but separation in social mores. Although assimilated politically into the British State, Scotland maintained a distinctive 'civil society'. This unusual juxtaposition had the effect of producing a distorted political culture, described by Nairn as 'cultural sub-nationalism', which manifested itself in popular literature, sport, the Church, and many other areas of Scottish society. So what, if anything, has been the effect of Scotland's 'unique historical development' on our three policy issues?

Perhaps one of the most profound manifestations of this distorted culture can be seen in Scottish attitudes towards drink. Chapter 6 outlined the social and historical context of drinking and its control in Scotland and traced the evolution of the different licensing systems north and south of the border. Culturally, Scotland developed an ambivalent attitude towards the consumption of alcohol. On the one hand it was seen as a sign of sociability, but on the other it was perceived as a dangerous drug if taken in excess. Vivid images were used by the Victorian temperance movements, founded on a strong Calvinist anti-drink tradition, to condemn the excessive use of alcohol. But alternative imagery, operating simultaneously, portrayed the use of alcohol

as being of considerable symbolic importance to the self-esteem of Scots. The modern legacy of this 'cultural neurosis' left Scotland with a very much higher proportion of alcohol related problems and disabilities than England and Wales where a more relaxed approach to the consumption of alcohol prevailed.

Politically, this can be seen in the different responses to the perceived problem north and south of the border. Both Committees of Inquiry, Errol and Clayson, were, in part, a response to the Monopolies Commission Report on the Sale and Supply of Beer. This Monopolies Commission Report applied only to England and Wales and was concerned with the 'tied house' system which was widespread there. Its main purpose was that of consumer protection - to ensure that the English consumer received a fair deal. Now while both Clayson and Errol had remits to review comprehensively licensing law, there was a divergence in the way the issue was approached. Since alcohol abuse was relatively less serious in England and Wales, Errol was at liberty to develop the theme of consumer interest more fully. The Clayson Committee while admittedly concerning itself with the wishes of the Scottish consumer, had to take into consideration the severity of alcohol misuse in Scotland. It was therefore under greater pressure to balance the interests of the consumer against the interests of public health. The package of pro-liberalisation recommendations were designed as a compromise solution to this. In comparison to Errol and in the context of the period, Clayson's main recommendations were much more politically realistic.

This seems to be one of the reasons why the Clayson Report was taken up and implemented while the Errol Report was not. Another was a greater sense of urgency in Scotland. The existing law was seen to be hopelessly outdated and ineffective in both the spheres of consumer

interest and public health. Consequently the pressure to reform was far greater in Scotland than it was in England, where, by and large, there was more widespread satisfaction with the way the law operated. This pressure to reform, fuelled in many respects by a sense of injustice that England was enjoying privileges being denied to Scotland, was part and parcel of the more general pressure in the seventies for fundamental political reform in the way Scotland was governed.

The divorce issue too, was very similar in as much as a sense of injustice again prevailed when it became widely realised that England was benefiting from 'advantages' which did not apply north of the border. Historically, Scotland had always taken pride in the fact that its divorce laws were more liberal and in advance of the statutes which prevailed in England. Even in the 1930s when the principles of the law came more closely into line north and south of the border, traditional differences in legal practice remained. So when in the mid-seventies Scotland gradually became aware that it was trailing in the wake of the 1969 English reform, there were once more feelings of being 'disadvantaged'.

This sense of injustice concerned both the substance of the reform and the procedure for obtaining it. Not only was the nature of the divorce measure at issue, Scottish business in Parliament generally was being called into question as a result of the much broader debate on constitutional reform. The apparent paradox was that pressure for uniformity in personal law should have come at a time when popular opinion was also demanding a separate legislature for Scotland. The divorce issue then, was in part a product of the new social confidence and political aggressiveness in Scotland in the 1970s, but it was also in part a product of Scotland's historical position within the British political system.

On the issue of homosexuality the sense of injustice was perhaps not as widespread, but it existed nevertheless, certainly within the homosexual community itself and amongst sympathetic organisations and individuals. But this pocket of liberal opinion contrasted with a more general feeling of distaste for the subject. And it was to appease both sections of public opinion that a policy of 'no prosecutions' was pursued. This enabled the Lord Advocate to allay the fears of homosexuals about prosecution provided their activities were kept private, and simultaneously to reassure the general public that homosexual acts remained criminal offences.

Scotland, then, seemed less keen than England to sanction a legislative reform which would publicly acknowledge the de-criminalisation of homosexual acts between consenting adults in private. Due to the lack of opinion poll data for Scotland it has been difficult to assess in what ways Scottish opinion might have differed from that in England. In the case of homosexuality though, there does seem to have been some moral conservatism amongst the public at large, which to some extent can be seen as a product of a distinctive cultural history. In 1975 'Gay News' published an article which postulated that it was the assertive religious philosophy of Calvin that was delaying legislative reform.¹² Whether this was true or not is perhaps not so important as the fact that 'Gay News' perceived it to be the case.

From the evidence that is available there do seem to have been some distinctive characteristics in Scottish opinion on these issues, characteristics which to some extent show signs of having been culturally transmitted. Yet, at the same time Scottish opinion appears to have been influenced by events in England as well. So, while the political histories of the cases differed either side of the border, the differences in policy content were not nearly so marked. This

was the point made by Parry, that Scotland's divergence from United Kingdom norms was often one of administrative distinctiveness rather than political substance.¹³

Scotland's administrative autonomy is a further manifestation of a 'unique historical development'. It is one of the cornerstones upon which Kellas founds his idea of a 'Scottish political system'. One problematical area though, identified at the outset, was how the Scottish system interacted with the British system. What were the boundaries of each system? What can the cases say about the dependence or independence of the Scottish system within the British system?

It was suggested in Chapter 2 that some kind of political system did *persist* after 1707 given that Scottish society, for the most part, remained intact. Yet this system operated in a dual capacity. The Scottish system could act as a means of communication with the larger British system in areas which were of 'British' concern, but it could also act in its own right in those areas which were of concern solely to the population of Scotland, areas covered by the activities of the Scottish Office and the Scottish legal system. But as Kellas himself has pointed out 'what has to be discovered is the range of activity which is effectively Scottish, despite the formal necessity for legislation or executive decision at the British level'.¹⁴

Thus, the Scottish system can be characterised as being both dependent and independent within the British system. The case studies have illustrated this particular dilemma well. Being issues which required separate legislation pertaining only to Scotland they have highlighted the way in which the Scottish political system can, in certain respects, operate in an independent capacity. Yet, they have also served to demonstrate that even when operating in this 'independent' capacity, the Scottish political system is often dependent upon

the larger British political system at critical moments in the policy process. Many examples from the case studies show the political 'dualism' of the Scottish system.

In the licensing study, for instance, the Clayson Committee operated autonomously under the auspices of the Scottish Home and Health Department, taking evidence on a Scottish issue from, in the main, Scottish pressure groups. Its Report, confined to the problem as it presented itself in Scotland, was the subject of an 'independent' debate in Parliament in the Scottish Grand Committee. The ensuing Licensing (Scotland) Bill was drafted within the Scottish Office and the principles of the Bill, upon reaching Parliament, were scrutinised once again by the Scottish Grand Committee. Yet, at the Report Stage, when the Bill reached the Floor of the House, it began to impinge upon the British system. It was at this point that David Steel made comments about Scottish legislation being 'relegated' to a late debating session after midnight, and Bruce Millan highlighted some of the problems which arose when English MPs were present to vote on purely Scottish issues. Here then is an example of the 'rather untidy overlap' between the Scottish and British systems at Westminster which at times both Scottish and non-Scottish MPs find irritating. Of course, once a Scottish Bill progresses to the House of Lords it then becomes wholly dependent on the British system, a point which Kellas appears to overlook.

This overlap between the two 'systems' was even more marked in the case of divorce. While divorce, because of legal tradition and practice, was an issue which fell within the activities of the Scottish system, it was nevertheless heavily dependent on the British system, both in the formation of opinion and in Parliament itself. As recorded earlier, the parameters of the divorce debate were very much influenced

by events in England. The Scottish Law Commission, while framing its proposals in the idiom of Scots Law, took its cue from the Law Commission which in turn had been prompted by the Church of England. Only the Church of Scotland can be said to have taken an 'independent' line. And in Parliament the issue was dependent on Private Members' procedure which is very much a part of the British system. So again the Scottish system encroached upon the British at that point in the policy process where the issue made demands on parliamentary time common to both systems. This is not to deny that Scottish Private Members' Bill could in fact make quicker progress through the use of one of the Scottish Standing Committees. However, the problem lay in getting the Bill into the legislative machine.

The dependent/independent dilemma also surfaced in the homosexuality issue. Through the discretion of the Lord Advocate a policy of 'no prosecutions' was pursued which typified Scotland's administrative autonomy. The Scottish system therefore acted independently in so far as it had the capacity to waive, by Executive decree, the enforcement of a criminal statute. But when it came to its ability to reform the statute legislatively, the Scottish system once more became dependent upon parliamentary time available within the British system. Indeed, such was this dependency upon 'British' parliamentary time that it took a procedurally unorthodox, but legitimate and innovative, manoeuvre to accomplish a legislative de-criminalisation of the offence in question.

Thus, even in those issues which are supposed to fall within the range of activities upon which the Scottish system is capable of acting independently, there nevertheless exists a dependency upon the British system whenever the Scottish system is required, by necessity, to make demands upon time common to both. This was one of the main

criticisms made against Parliament in the 1970s by advocates of devolution. In light of our case studies then, how is this criticism of Parliament's ability to handle Scottish affairs to be assessed?

It was conceded in Chapter 3 that our case studies were perhaps not wholly typical of Scottish policy formulation. Nonetheless, they have provided a means to explore, as compared with the rest of Britain, what variations might have existed in the substantive policy areas in question and in the political and administrative processes by which these policies came to be formulated. Further, it was suggested that Parliament's handling of these cases became embroiled in the rhetoric of the devolution debate. Consider, for instance, an utterance from Lord James Douglas-Hamilton on the Second Reading of the 1976 divorce reform:

'It seems that the history of the Bill serves to highlight the need for a Scottish Assembly. Although Scotland may have less than 10% of Britain's population, we need more parliamentary time allocated to us'.¹⁵

One of the things the case studies have tried to demonstrate is that parliamentary time was only one of many considerations influencing policy development. However, James Douglas-Hamilton did have a point. The analysis of the Ballot (see Appendix I) revealed that Scots MPs were not in fact statistically disadvantaged in the draw. This, though, took no account of the position attained in the Ballot or of the type of Bill sponsored. When this was taken into consideration it was found that the chances of a Scots MP being drawn high in the Ballot *and then sponsoring a Scottish Bill* were indeed rather slim. Earlier the comment was made that this revealed much about the attitudes of Scottish MPs. It also reveals much about the pressures brought to bear upon them. A Scots MP is not only approached by Scottish lobbyists but also by UK lobbyists. Generally speaking, an

English MP will sponsor an English issue or a UK issue, while a Scots MP will sponsor a Scottish issue or a UK issue. It is rare to find an English MP sponsoring something purely Scottish, or a Scots MP sponsoring something purely English. However, it is not necessarily the case that there are less Scottish issues in need of consideration than English. The point, therefore, is that a similar number of Scottish issues have to compete for far fewer available places in the Ballot.

The problem, though, is political rather than statistical. It involves the curious juxtaposition of an independent Scottish legal system and a unitary British state. Scotland's legal system is probably one of the few in the world which has no legislative body of its own. In this regard it has been described as a 'constitutional hiccup'.¹⁶ Over the years Scots have had to look increasingly towards England, 'scanning the growing flood of UK legislation for matters affecting Scotland in enactments often framed to suit English law, and watching warily for the next standardising grenade tossed up from Whitehall'.¹⁷ The problem is that by reason of proportion Scotland only has a very limited voice in the UK Parliament, the consequence of which is that any matter affecting Scots law can be altered by the majority even although the majority may not be Scottish and may have no knowledge of, or interest in, Scotland. Two alternative solutions were postulated in the seventies - uniformity or devolution.

For issues of conscience the case for uniformity in the law throughout Britain is strong since in the interests of social justice there should be general equality before the law. The case studies have shown that in fact there was a remarkable similarity in the principles in each of the policy areas either side of the border. But they have also shown distinctive characteristics, particular to

Scotland's administrative, legal and cultural traditions. The price of uniformity then, would be high. If taken to its logical conclusion it would mean the eclipse of Scottish legal and cultural traditions as Scots law was subsumed within a unified system dominated by English legal practice. For many this price would be too high to pay. It would represent a further assimilation of a distinctive feature of Scottish life to English practice and in the process would erode Scottish claims to 'nationhood'. Politically, at least in the foreseeable future, it would appear an unrealistic option, since such a legal unification would engender considerable opposition amongst many sections of Scottish opinion, not least the Scottish legal profession whose professional interests would be at stake.

Legal patriotism, however, should be founded on more than sentiment or professional self-interest. One obvious option for a legal system without its own legislature is to provide it with one. This was the devolution option which came to dominate Scottish politics in the 1970s and of which our case studies were so much a part. So how then, might a Scottish Assembly have handled these and other issues?

The simple fact of the matter is that no one knows because the structure and procedure of the Assembly was to be decided by the Assembly itself once it had been set up. Perhaps though, at this stage in the thesis, the author may be allowed a paragraph or two to speculate.

It is likely that in terms of departmental structure the Assembly would have opted for a limited number of large departments divided on a functional basis. Three reasons suggest themselves for this. Firstly, there would have been pressure from senior Scottish civil servants for as little initial change as possible. Secondly, a small number of departments would have facilitated central co-ordination.

And thirdly, departments would have been divided functionally because these were familiar, well established and understood by other official bodies. Initially then, change would have been minimal in order to facilitate the transfer of power and to operationalise swiftly Assembly policies.

However, there would appear to have been more scope for Assembly initiative in the sphere of scrutiny and influence where a system of specialised Select Committees to shadow the activities of each department was a strong frontrunner. As well as shadowing individual departments, Committees would also have been concerned to monitor the Assembly's accounts and proposed expenditure. And in the area of legislation one idea was for the Assembly to introduce an investigative phase in procedure whereby, on or before Second Reading, outside witnesses, civil servants and Ministers could be called upon to provide information and be questioned on various aspects of the Bill in hand.

It has been pointed out several times in the thesis that our case studies are perhaps not typical of Scottish policy formulation in so far as they are not concerned with resource allocation. Therefore it would be foolish to pretend that they would have been amongst the Assembly's 'bread and butter' issues, such as finance, health, education, housing, local government or transport. Nevertheless, when these issues needed to be reviewed the Assembly would have provided an autonomous Scottish forum for debate. Although an Assembly would not have been able to prevent metropolitan values from the south influencing opinion within its debating chamber, it would have had the capacity to legislate independently in Scottish affairs, freeing Scotland from its dependence on the priorities and timetable of Parliament, and providing the 'missing link' which could have transformed a Scottish

sub-system into the genuine article, that is, a Scottish political system with its own legislature.

The aim at the outset of this thesis was to identify the 'Scottish dimension' in our case studies by assessing in what ways Scottish culture and politics came to impinge upon the emergence and development of policy. So how then, can the Scottish dimension be expressed and summarised? The difficulty in answering this concisely lies in the multiplicity of factors which go to make up the Scottish dimension. The individual conclusions to each of the cases have already illustrated this. Scottish 'particularity', then, is multi-dimensional. It manifests itself in several ways - in the historical development of Scotland and its effect on the context of each reform, in the way in which pressure was channelled through Scottish organisations and pressure groups, in the administrative autonomy of the Scottish Office, in the distinctive legislative procedure in Parliament for purely Scots issues, in the dual role of individual MPs operating in a Scottish arena and a UK arena, in the values of decision-makers particularly those with power over the political agenda, in ambivalent social mores and public opinion, and in a culturally transmitted political inferiority complex.

Thus, the most striking feature of Scottish particularity is its dualism - historical dualism in Scotland's assimilation into the British state while it maintained its 'civil society', political dualism in Scotland's apparent capacity to operate independently within its own 'political system' while it remained dependent upon the British system, and social dualism in Scotland's requirement for separate legislation in the idiom of Scots law while it adopted substantively similar policies as south of the border. With such a unique cultural heritage generating ambivalent tendencies within Scottish society, the

description of contemporary Scotland as 'an unclassifiable marginal aberration' may not be so wide of the mark.

1. R. Cook, 'Parliament and the Scots Conscience', Scottish Government Yearbook 1978, Edinburgh, Paul Harris, p. 102.
2. P. Norton, The Commons in Transition, Oxford, Martin Robertson, 1981, p. 246.
3. G. Smith and D. May, 'The Artificial Debate Between Rationalist and Incrementalist Modes of Decision-Making', Policy and Politics, 8, 1980, p. 156.
4. see R. D. Kernohan, 'Crisis in the Kirk', in the Scotsman Magazine, Vol. 3, No. 2, May 1982.
5. P. Richards, Parliament and Conscience, London, Allen and Unwin, 1970, p. 203.
6. R. Crossman, The Diaries of a Cabinet Minister, London, Hamilton and Cape, 1976, Vol. 2, p. 610.
7. G. Debnam, 'Non-Decisions and Power : The Two Faces of Bachrach and Baratz', American Political Science Review 69, 1975, p. 895.
8. J. J. McManus, 'The Emergence and Non-Emergence of Legislation', British Journal of Law and Society 5, 1978, p. 187.
9. L. J. F. Smith, 'The Abortion Law Controversy 1936-77 : A Case Study in "Emergence of Law"', Ph.D. thesis, University of Edinburgh, 1979.
10. J. Kellas, 'The Political Response', in R. Underwood (ed), The Future of Scotland, London, Croom Helm, 1977, p. 167.
11. C. H. Allen, 'The Study of Scottish Politics : A Bibliographical Sermon', Scottish Government Yearbook 1980, Edinburgh, Paul Harris, p. 27.
12. Gay News, No. 85, 1975, p. 27.
13. R. Parry, 'Scotland as a Laboratory for Public Administration', Paper prepared for the 6th annual conference of the PSA United Kingdom Politics Work Group, Glasgow, September 1981.
14. J. Kellas, The Scottish Political System 2nd Edn, Cambridge, C.U.P., 1975, p. 16.
15. H. of C. Parl. Debs., Vol. 906, col. 817.
16. S. Magnusson, 'Scots soon may not be a law unto themselves', The Scotsman, 18th November, 1980.
17. *ibid.*

BIBLIOGRAPHY

- ABSE, L. Private Member. London, Macdonald, 1973.
- ALLEN, C. H. 'The Study of Scottish Politics: A Bibliographical Sermon'. Scottish Government Yearbook 1980. Edinburgh, Paul Harris, pp. 11-41.
- ARTHUR, P. 'The Break-up of Britain?'. Parliamentary Affairs 31, 1978, pp. 220-25.
- ASHFORD, D. Policy and Politics in Britain: The Limits of Consensus. Oxford, Basil Blackwell, 1981.
- BACHRACH, P. and BARATZ, M. 'Two Faces of Power'. American Political Science Review 56, 1962, pp. 947-52.
- BACHRACH, P. and BARATZ, M. 'Decisions and Non-Decisions'. American Political Science Review 57, 1963, pp. 632-642.
- BANTING, K. G. Poverty, Politics and Policy: Britain in the 1960s. London, Macmillan, 1979.
- BARKER, A. and RUSH, M. The Member of Parliament And His Information. London, Allen and Unwin, 1970.
- BARKER, R. 'Taking Uncivil Liberties with Sexuality'. Political Quarterly 49, 1978, pp. 99-102.
- BARRETT, S. and FUDGE, C. (eds.) Policy and Action: Essays on the Implementation of Public Policy. London, Methuen, 1981.
- BAUER, R. A. and GERGEN, K. J. The Study of Policy Formation. New York, Free Press, 1968.
- BEAUCHAMP, T. L. Ethics and Public Policy. New Jersey, Prentice-Hall, 1975.
- BECKER, H. 'Social Observations and Social Case Studies'. International Encyclopedia of the Social Sciences 11, 1968, pp. 232-8.
- BELL, C. and NEWBY, H. (eds) Doing Sociological Research. London, Allen and Unwin, 1977.
- BENEWICK, R. and DOWSE, R. E. Readings on British Politics and Government. London, Univ. of London Press, 1968.
- BERELSON, B. and JANOWITZ, M. Reader in Public Opinion and Communication. New York, Free Press, 2nd Ed., 1966.
- BIRCH, A. Representative and Responsible Government. London, Allen and Unwin, 1964.
- BIRCH, A. Political Integration and Disintegration in the British Isles. London, Allen and Unwin, 1977.

- BLOM-COOPER, L. and DREWRY, G. *Law and Morality*. London, Duckworth, 1976.
- BLUME, S. 'Policy Studies and Social Policy in Britain.' *Journal of Social Policy*, 8, 1979, pp. 311-34.
- BOND, M. F. *Guides to the Records of Parliament*. London, HMSO, 1971.
- BRAND, J. *The National Movement in Scotland*. London, Routledge and Kegan Paul, 1978.
- BRAYBROOKE, D. and LINDBLOM, C. E. *A Strategy of Decision*. New York, Free Press, 1963.
- BROMHEAD, P. A. *Private Members' Bills In The British Parliament*. London, Routledge and Kegan Paul, 1956.
- BROOKES, S. K. and RICHARDSON, J. J. 'The Environmental Lobby in Britain.' *Parliamentary Affairs* 28, 1974-75, pp. 312-28.
- BULMER, M. *Social Policy Research*. London, MacMillan, 1978.
- BULMER, M. (ed) *Social Research and Royal Commissions*. London, Allen and Unwin, 1980.
- BULPITT, J. 'The Making of the United Kingdom: Aspects of English Imperialism'. *Parliamentary Affairs* 31, 1978, pp. 174-89.
- BURTON, I. and DREWRY, G. 'Legislation and Public Policy.' *Parliamentary Affairs* (annual series).
- BUTT, R. *The Power of Parliament*. London, Constable, 1967.
- CHAPMAN, R. A. *The Role of Commissions in Policy Making*. London, Allen and Unwin, 1973.
- CARLEY, M. *Rational Techniques in Policy Analysis*. London, Heinemann, 1980.
- CARRIER, J. and KENDALL, I. 'Social Policy and Social Change'. *Journal of Social Policy* 2, 1973, pp. 209-24.
- CARRIER, J. and KENDALL, I. 'The Development of Welfare States: The Production of Plausible Accounts'. *Journal of Social Policy* 6, 1977, pp. 271-90.
- CARIWRIGHT, T. J. *Royal Commissions and Departmental Committees in Britain*. London, Hodder and Stoughton, 1975.
- CHURCH OF ENGLAND, Archbishop of Canterbury's Group on the Divorce Law. *Putting Asunder: A Divorce Law for Contemporary Society*. London, SPCK, 1966.
- CHURCH OF SCOTLAND, Reports of the General Assembly, 1958; 1966; 1967; 1968; 1969; 1970; 1974; 1975.

- CHURCH OF SCOTLAND, Social Responsibility Committee. *Obscenity and Community Standards*. Edinburgh, The St. Andrew Press, 1979.
- COOK, R. F. 'Parliament and the Scots Conscience'. *Scottish Government Yearbook* 1978. Edinburgh, Paul Harris.
- COPE, E. 'Consultation or Confrontation: The Campaign to save the Scottish Colleges of Education.' *Scottish Government Yearbook* 1978, Edinburgh, Paul Harris, pp. 88-98.
- CRENSON, M. *The Un-Politics of Air Pollution*. Baltimore, John Hopkins, 1971.
- CRICK, B. *Essays on Reform*. London, OUP, 1967.
- CROSSMAN, R. *The Diaries of a Cabinet Minister*. London, Hamilton and Cape, 1976.
- DALYELL, T. *Devolution: The End of Britain*. London, Jonathon Cape, 1977.
- DEBNAM, G. 'Non-Decisions and Power: The Two Faces of Bachrach and Baratz'. *American Political Science Review* 69, 1975, pp. 889-99.
- DELAMONT, S. 'Cultural Reproduction and Scottish Elites'. *Scottish Journal of Sociology* 1, 1976, pp. 29-44.
- DEUTSCH, K. W. *Politics and Government*. Boston, Houghton Mifflin, 1970.
- DEVLIN, P. *The Enforcement of Morals*. Oxford, OUP, 1965.
- DEXTER, L. A. *Elite and Specialized Interviewing*. Evanston, Northwestern University Press, 1970.
- DILLON, G. M. 'Policy and Dramaturgy: A Critique of Current Conceptions of Policy Making'. *Policy and Politics* 5, 1976-77, pp. 47-62.
- DOD'S *Parliamentary Companion*.
- DREWRY, G. 'Parliament and Hanging'. *Parliamentary Affairs* 27, 1973-74, pp. 251-61.
- DROR, Y. 'Muddling Through: Science or Inertia?'. *Public Administration Review* 24, 1964, 153-7.
- DROR, Y. *Public Policy Making Re-examined*. New York, Chandler, 1968.
- DRUCKER, H. M. and BROWN, G. *The Politics of Nationalism and Devolution*. London, Longman, 1980.
- DUSTER, T. *The Legislation of Morality*. New York, 1970.
- DWORKIN, R. *Taking Rights Seriously*. London, Duckworth, 1977.
- DWORKIN, R. (ed.) *The Philosophy of Law*. Oxford, OUP, 1977.
- EASTON, D. *A Framework for Political Analysis*. New Jersey, Prentice-Hall, 1965.

- EDWARDS, G. and GRANT, M. *Alcoholism: New Knowledge and New Responses*. London, Croom Helm, 1977.
- EDWARDS, G. E. 'The Scottish Grand Committee, 1958 to 1970'. *Parliamentary Affairs* 25, 1971-72, pp. 303-325.
- EDWARDS, J. 'Subjectivist Approaches to the Study of Social Policy Making'. *Journal of Social Policy* 10, 1981, pp. 289-311.
- ERSKINE MAY'S *PARLIAMENTARY PRACTICE* Butterworth, London.
- ETZIONI, A. 'Mixed Scanning - A Third Approach to Decision-Making'. *Public Administration Review* 27, 1967, pp. 385-92.
- ETZIONI, A. *The Active Society*. New York, Free Press, 1968.
- EVANS, M. 'Notes on David Easton's model of the political system'. *Journal of Commonwealth Political Studies*, 8, 1970, pp. 117-133.
- FRANCOME, C. 'Abortion: Why the Issue has not Disappeared'. *Political Quarterly* 49, 1978, pp. 217-22.
- FREY, F. W. 'Comment: On Issues and Non-issues in the Study of Power'. *American Political Science Review* 65, 1971, pp. 1081-1101.
- FORD, P. and FORD, G. *A Guide to Parliamentary Papers*. Shannon, Irish University Press, 1972.
- FULLER, M. 'Parliamentary Voting Patterns on Non-Party Issues'. M.Phil. Thesis, Univ. of Southampton, 1970.
- GELLNER, E. 'Review: The Break-up of Britain'. *Political Quarterly* 49, 1978, pp. 103-11.
- GIBSON, P. 'How Scotland got the Housing (Homeless Persons) Act'. *Scottish Government Yearbook* 1979, Edinburgh, Paul Harris, pp. 36-47.
- GORDEN, R. L. *Interviewing: Strategy, techniques and tactics*. Homewood, Illinois, Dorsey Press, 1975.
- GORDON, I., LEWIS, J. and YOUNG, K. 'Perspectives on Policy Analysis'. *Public Administration Bulletin* 25, 1977, pp. 26-35.
- GRASMUCK, S. 'Ideology of Ethnoregionalism: The Case of Scotland'. *Politics and Society* 9, 1980, pp. 471-93.
- GREGORY, R. *The Price of Amenity: Five Studies in Conservation and Government*. London, Macmillan, 1971.
- GRIFFITH, J. A. G. *Parliamentary Scrutiny of Government Bills*. London, Allen and Unwin, 1974.
- GUARDIAN DIRECTORY OF PRESSURE GROUPS AND REPRESENTATIVE ASSOCIATIONS. London, Wilton House, 1976.

- GUNN, L. 'Devolution: A Scottish View'. *Political Quarterly* 48, 1977, pp. 129-39.
- GUNN, L. and LINDLEY, P. 'Devolution: Origins, Events and Issues'. *Public Administration Bulletin* 25, 1977, pp. 36-54.
- HALL, P., LAND, H., PARKER, R. and WEBB, A. *Change, Choice and Conflict in Social Policy*. London, Heinemann, 1975.
- HAM, C. 'Approaches to the Study of Social Policy Making'. *Policy and Politics* 8, 1980, pp. 55-71.
- HAMER, D. A. *The Politics of Electoral Pressure*. New Jersey, Harvester Press, 1977.
- HANBY, V. J. 'Current Scottish Nationalism'. *Scottish Journal of Sociology* 1, 1977, pp. 95-110.
- HARRISON, B. *Drink and the Victorians*. London, Faber and Faber, 1971.
- HEASMAN, D. J. 'Sexual and Civil Liberties'. *Political Quarterly* 48, 1977, pp. 313-27.
- HEASMAN, D. J. 'Liberties, Civil and Uncivil'. *Political Quarterly* 49, 1978, pp. 227-31.
- HECLO, H. 'Review Article: Policy Analysis'. *British Journal of Political Science* 2, 1972, pp. 83-108.
- HENDERSON, H. 'Scottish Legislation in the Seventies'. *Scottish Government Yearbook* 1981. Edinburgh, Paul Harris, pp. 253-277.
- HINDELL, K. and SIMMS, M. 'How the Abortion Lobby Worked'. *Political Quarterly* 39, 1968, pp. 269-82.
- HODDER-WILLIAMS, R. *Public Opinion Polls and British Politics*. London, Routledge and Kegan Paul, 1970.
- HOFFERBERT, R. *The Study of Public Policy*. New York, Bobs-Merrill, 1974.
- HOLBROOK, D. 'The Politics of Pornography'. *Political Quarterly* 45, 1977, pp. 44-53.
- HOOD, C., DUNSIRE, A. and THOMPSON, S. 'Comparing the Scottish Office with Whitehall: A Quantative Approach'. *British Journal of Political Science* 9, 1979.
- JEGER, L. 'The Politics of Family Planning'. *Political Quarterly* 33, 1962, pp. 48-58.
- JENKINS, W. I. *Policy Analysis: A Political and Organisational Perspective*. London, Martin Robertson, 1978.
- JOHNSON, R. W. 'Nairn and the Break-up of Britain'. *Political Studies* 26, 1978, pp. 119-22.

- JUDGE, D. 'Representative Theories and Parliamentary Specialisation.'
Parliamentary Affairs 33, 1980.
- JUDGE, D. and FINLAYSON, D. 'Scottish MPs: Problems of Devolution'.
Parliamentary Affairs 28, 1974-75, pp. 278-92.
- KAHN, R. L. and CANNELL, C. F. The Dynamics of Interviewing. New
York, John Wiley, 1970.
- KEATING, M. J. 'The role of the Scottish MP in the Scottish political
system, in the United Kingdom political system, and in the
relationship between the two.' Ph.D. Thesis, CNAA, 1975.
- KELLAS, J. G. The Scottish Political System. Cambridge, C.U.P., 2nd
Edn., 1975.
- KELLAS, J. G. 'Review Article: Political Science and Scottish Politics'.
British Journal of Political Science 10, 1980, pp. 365-79.
- KIMBER, R. and RICHARDSON, J. J. Pressure Groups in Britain. London
Dent, 1974.
- KING, A. British Members of Parliament: A Self-Portrait. London,
Macmillan, 1974.
- KING, A. British Politics: People, Parties and Parliament. Boston,
D. C. Heath, 1966.
- KING, R. and NUGENT, N. (eds.) Respectable Rebels: Middle Class
Campaigns in Britain in the 1970s. London, Hodder and Stoughton,
1979.
- KLEIN, R. 'The Case for Elitism: Public Opinion and Public Policy'.
Political Quarterly 45, 1974, pp. 406-17.
- LAW COMMISSION Reform of the Grounds of Divorce: The Field of Choice.
Cmd 3123, London, HMSO, 1966.
- LEE, J. M. 'The Political Significance of Licensing Legislation'.
Parliamentary Affairs 1960-1, pp. 211-28.
- LEONARD, D. and HERMAN, V. The Backbencher and Parliament. London,
Macmillan, 1972.
- LINDBLOM, C. 'The Science of Muddling Through'. Public Administration
Review 19, 1959, pp. 79-88.
- LONGMATE, N. The Waterdrinkers: A History of Temperance. London,
Hamish Hamilton, 1968.
- LOWI, T. 'Decision Making vs Public Policy'. Public Administration
Review 30, 1970, pp. 314-25.
- LUCAS, J. R. Democracy and Participation. London, Penguin, 1976.

- LUKES, S. *Power: A Radical View*. London, Macmillan, 1974.
- MACKAY, D. (ed) *Scotland: The Framework for Change*. Edinburgh, Paul Harris, 1979.
- MCDONALD, M. and REDPATH, A. 'The Scottish Office'. *Scottish Government Yearbook* 1980, Edinburgh, Paul Harris, pp. 101-134.
- MCGREGOR, O. R. *Divorce in England*. London, 1957.
- MCGREGOR, O. R. 'Equality, Sexual Values and Permissive Legislation: The English Experience.' *Journal of Social Policy* 1, 1972, pp. 44-59.
- MCLEAN, I. 'The politics of nationalism and devolution'. *Political Studies* 25, 1977, pp. 425-30.
- McMANUS, J. 'Emergence and Non-emergence of Legislation'. *British Journal of Law and Society* 5, 1978, pp. 185-20.
- McWHIRTER, I. 'Review of the Break-up of Britain'. *Capital and Class* 5, 1978, pp. 142-45.
- MERLEMAN, R. M. 'On the Elitist Critique of Community Power'. *American Political Science Review* 62, 1968, pp. 451-60.
- MILLARD, P. *Trade Associations and Professional Bodies of the United Kingdom*, 5th Edn. Oxford, Pergamon Press, 1971.
- MINOGUE, M. *British Government and Constitutional Change*. Cambridge, 1977.
- MITCHELL, K. *The Drink Question*. London, Swan Sonnenschein, 1899.
- MOODIE, G. C. and STUDDERT-KENNEDY, G. *Opinions, Publics and Pressure Groups*. London, Allen and Unwin, 1970.
- MORGAN, G. 'All Party Committees in the House of Commons'. *Parliamentary Affairs* 32, 1979.
- MOSER, G. *Problems and Programmes Related to Alcohol and Drug Dependence*. Geneva, WHO, 1974.
- MOYSER, G. 'Voting Patterns on "moral" Issues in the British House of Commons, 1964-69'. *Political Studies Association Paper* 1980.
- NAIRN, T. *The Break-up of Britain*. London, NLB, 1977.
- NETTL, P. 'The concept of system in political science'. *Political Studies* 14, 1966, pp. 305-38.
- NORTON, P. 'Private Legislation and the Influence of the Backbench MP'. *Parliamentary Affairs* 30, 1977, pp. 356-62.
- NORTON, P. *Dissension in the House of Commons 1974-79*. Oxford, Clarendon, 1980.
- NORTON, P. 'The House of Commons and The Constitution: The Challenges of the 1970s'. *Parliamentary Affairs* 34, 1981, pp. 253-71.

- NORTON, P. *The Commons in Transition*. Oxford, Martin Robertson, 1981.
- NAGEL, S. *Policy Studies and the Social Sciences*. Lexington, Massachusetts, D. C. Heath, 1975.
- O'CONNOR, J. *The Young Drinkers*. London, Tavistock, 1978.
- OSSOWSKA, M. *Social Determinants of Moral Ideas*. London, Routledge and Kegan Paul, 1971.
- PARKER, J. 'The Battle for the Legitimacy Act 1959'. *Political Quarterly* 43, 1972, pp. 308-16.
- PARSONS, T. *Theories of Society*. New York, Free Press, 1961.
- PARRY, R. 'Scotland as a Laboratory for Public Administration'. Paper prepared for the 6th annual conference of the PSA United Kingdom Politics Work Group, Glasgow, September, 1981.
- PLANT, M. *Drinking Careers: Occupations, Drinking Habits and Drinking Problems*. London, Tavistock, 1979.
- PLANT, M. (ed.) *Drinking and Problem Drinking*. London, Junction Books, 1982.
- POOLE, K. P. 'The Power of Select Committees of the House of Commons to Send for Persons, Papers and Records'. *Parliamentary Affairs* 32, 1979.
- POPHAM, G. T. 'Government and Smoking: Policy-making and Pressure Groups'. *Policy and Politics* 9, 1981, pp. 331-48.
- PORNOGRAPHY: THE LONGFORD REPORT. London, Coronet, 1972.
- POTTER, A. *Organized Groups in British National Politics*. London, Faber and Faber, 1961.
- POTTINGER, G. *The Secretaries of State for Scotland 1926-1976*. Edinburgh, 1979.
- PUNNET, R. M. *British Government and Politics*. London, Heinemann, 1968.
- PUTNAM, R. *The Beliefs of Politicians: Ideology, Conflict and Democracy in Britain and Italy*. New Haven, Yale Univ. Press, 1973.
- PUTNAM, R. 'The Political Attitudes of Senior Civil Servants in Western Europe'. *British Journal of Political Science* 3, 1973, pp. 257-90.
- PUTNAM, R. 'Studying Elite Political Culture: The Case of Ideology'. *American Political Science Review* 65, 1971, pp. 651-81.
- PYM, B. A. 'Pressure Groups on Moral Issues'. *Political Quarterly* 43, 1972, pp. 317-27.
- RAKOFF, S. and SCHAEFER, G. 'Politics, Policy and Political Science: Some Theoretical Alternatives'. *Politics and Society* 1, 1970, pp. 51-77.

- REPORT OF THE ROYAL COMMISSION ON DIVORCE AND MATRIMONIAL CAUSES, 1912-13. Cd. 6481, London, HMSO, 1913.
- REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-53. Cmd. 8932, London, HMSO, 1953.
- REPORT OF THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE. Cmd. 9678, London, HMSO, 1956.
- REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION. Cmd. 247, London, HMSO, 1957.
- REPORT OF THE COMMITTEE ON SCOTTISH LICENSING LAW. Cmd. 1217, London, HMSO, 1960.
- REPORT OF THE COMMITTEE ON SCOTTISH LICENSING LAW. Cmd. 2021, London, HMSO, 1963.
- REPORT OF THE DEPARTMENTAL COMMITTEE ON LIQUOR LICENSING. Cmd. 5154, London, HMSO, 1972.
- REPORT OF THE DEPARTMENTAL COMMITTEE ON SCOTTISH LICENSING LAW. Cmd. 5354, London, HMSO, 1973.
- REPORT OF THE ROYAL COMMISSION ON THE CONSTITUTION, 1968-73. Cmd. 5460, London, HMSO, 1973.
- REPORT OF THE COMMITTEE ON THE WORKING OF THE ABORTION ACT. Cmd. 5579, London, HMSO, 1974.
- REPORT OF THE COMMITTEE ON OBSCENITY AND FILM CENSORSHIP. Cmd. 7772, London, HMSO, 1979.
- RICHARDS, P. G. Parliament and Conscience. London, Allen and Unwin, 1970.
- RICHARDSON, J. J. and JORDAN, A. G. Governing Under Pressure: The Policy Process in a Post-Parliamentary Democracy. London, Martin Robertson, 1979.
- ROEBUCK, J. and KESSLER, R. The Etiology of Alcoholism: Constitutional, Psychological and Sociological Approaches. Springfield, Illinois, Thomas, 1974.
- ROSE, H. 'The Immigration Act 1971: A Case Study in the Work of Parliament'. Parliamentary Affairs 26, 1972-73, pp. 69-91.
- ROSE, R. Studies in British Politics. London, Macmillan, 1966.
- ROSE, R. Policy-Making in Britain. London, Macmillan, 1969.
- ROSE, R. (ed) The Dynamics of Public Policy: A Comparative Analysis. London, SAGE Publications, 1976.
- ROSS, W. 'Approaching the Archangelic'. Scottish Government Yearbook 1978, Edinburgh, Paul Harris, pp. 1-20.

- RYLE, M. 'Private Members Bills'. *Political Quarterly* 37, 1966, pp. 385-93.
- SCHATTSCHEIDER, E. E. *The Semi-Sovereign People*. New York, Holt, 1960.
- SCIOLI, F. P. and COOK, T. J. *Methodologies For Analyzing Public Policies*. Lexington, Massachusetts, D. C. Heath, 1975.
- SCOTTISH HEALTH EDUCATION UNIT. *Understanding Alcohol and Alcoholism in Scotland*. HMSO, 1976.
- SCOTTISH LAW COMMISSION. *Divorce: The Grounds Considered*. Cmd. 3256, London, HMSO, 1967.
- SHARKANSKY, I. (ed.) *Policy Analysis in Political Science*. Chicago, Markham, 1970.
- SIMEON, R. 'Studying Public Policy'. *Canadian Journal of Political Science* 9, 1976, pp. 548-80.
- SMITH, B. *Policy Making in British Government*. London, Martin Robertson, 1976.
- SMITH, B. 'The Politics of Devolution'. *Public Administration Bulletin* 23, 1977, pp. 63-67.
- SMITH, G. and MAY, D. 'The Artificial Debate between Rationalist and Incrementalist Models of Decision-Making'. *Policy and Politics* 8, 1980, pp. 147-61.
- SMITH, L. J. F. 'The Abortion Controversy 1936-77: A Case-Study in "Emergence of Law"'. Ph.D. Thesis, University of Edinburgh, 1979.
- STEINER, J. and DORFF, R. H. 'Decision by Interpretation: A New Concept for an Often Overlooked Decision Mode'. *British Journal of Political Science* 10, 1980, pp. 1-13.
- STRINGER, J. K. and RICHARDSON, J. J. 'Managing The Political Agenda: Problem Definition and Policy Making in Britain'. *Parliamentary Affairs* 33, 1980.
- TAYLOR, A. J. P. *English History 1914-45*. Oxford, OUP, 1965.
- TIMES GUIDE TO THE HOUSE OF COMMONS. Times Newspapers.
- UNDERWOOD, R. *The Future of Scotland*. London, Croom Helm, 1977.
- VALLANCE, E. 'Rights and Social Policy'. *Political Quarterly* 45, 1974, pp. 461-69.
- VINCENT, J. R. 'The House of Lords'. *Parliamentary Affairs* 19, 1965-66.
- WALKLAND, S. A. and RYLE, M. *The Commons in the Seventies*. Glasgow, Fontana/Collins, 1977.
- WALSH, B. *Drinking in Ireland*. Irish Economic and Social Research Institute, 1980.

- WANN, D. M. and BRUCE, D. 'Evening Extension of Licensing Hours: Survey of Licensed Premises'. Scottish Office, 1979.
- WARE, A. 'The Concept of Manipulation: Its relationship to Democracy and Power'. British Journal of Political Science 11, 1981, pp. 163-81.
- WASSERSTROM, R. A. Morality and The Law. Belmont, California, Wadsworth Publishing, 1971.
- WATT, D. 'The March 1st Referendum'. Political Quarterly 50, 1979, pp. 145-47.
- WEBB, A. L. 'Planning Enquiries and Amenity Policy'. Policy and Politics 1, 1972, pp. 65-74.
- WEISS, C. H. (ed.) Using Social Research in Public Policy Making. Lexington, Massachusetts, D. C. Heath, 1977.
- WELCH, S. and COMER, J. Public Opinion: Its Formation, Measurement, and Impact. Mayfield, California, 1975.
- WILDAVSKY, A. Speaking Truth to Power: The Art and Craft of Policy Analysis. Boston, Little, Brown and Co., 1979.
- WILKINSON, R. The Prevention of Drinking Problems: Alcohol Control and Cultural Influences. New York, OUP, 1970.
- WILLIAMS, P. 'Interviewing Politicians: The Life of Hugh Gaitskell'. Political Quarterly 51, 1980, pp. 303-316.
- WILSON, G. Alcohol and the Nation. London, Nicholson and Watson, 1940.
- WILSON, P. 'Drinking Habits in the United Kingdom'. Population Trends, OPCS, London, HMSO, 1980, pp. 14-18.
- WISEMAN, C. 'Policy-Making in the Scottish Health Services at National Level'. Scottish Government Yearbook 1980. Edinburgh, Paul Harris, pp. 135-160.
- WISEMAN, H. Political Systems. London, Routledge and Kegan Paul, 1966.
- WOBER, M. 'Public Opinion and Direct Broadcasting as an Aid to the Efficacy of Parliament'. Political Quarterly 50, 1979.
- WOLFINGER, R. E. 'Non-Decisions and the Study of Local Politics'. American Political Science Review 65, 1971, pp. 1063-80.
- WOOTTON, G. Pressure-Group Politics in Contemporary Britain. Lexington, Massachusetts, D. C. Heath, 1979.
- YOUNG, K. 'Values in the Policy Process'. Policy and Politics 5, 1977, pp. 1-22.
- YOUNG, K. and MILLS, L. 'Understanding the "Assumptive Worlds" of Governmental Actors: Issues and Approaches'. Report to the SSRC Panel on Central/Local Government Relations. September, 1978.

APPENDIX I

The Ballot

Table I.1 illustrates the breakdown of the Private Members' Ballot for the 16 Parliamentary Sessions from 1966 to 1980. This covers a span of 5 different Parliaments. Column (1) of the table shows that the total number of Private Members' Bills introduced by Ballot procedure during this period was 336. Each Session the first 20 MPs selected in the Ballot are allocated a place to introduce a Bill of their choosing, although throughout the late 60s a slightly higher number appear to have been drawn. The short Parliamentary Session of 1974 however, had a reduced Ballot of only 10.

From column (2) it can be seen that of these 336 places Scottish Members won 42. This represents a 12.5% share of the Ballot places available during these years. Since Scotland's 71 MPs represent 11.2% of all Members sitting in Parliament, Scottish Members appear to have won a marginally greater percentage of places in the Ballot than their parliamentary membership. Certainly on this evidence there can be no suggestion that the Ballot has in any way operated against Scots MPs. In each of the 16 Sessions at least one Scottish MP has won a place, and on three occasions there have been as many as five.

Columns (3) and (4) show the type of Bill - that is whether it applied to Scotland only or to the UK as a whole - which each of the 42 Scots Members introduced. Less than half or 45.2% (19) chose to sponsor a Bill particular to Scotland, as opposed to the 54.8% (23) who favoured a UK Bill.

Since Private Members' time is so scarce only a limited number of Bills have any chance of succeeding. Unless a Bill is so uncontroversial as to proceed unopposed it is usually only those near the top

of the Ballot which have a realistic chance. Generally speaking, the first eight in the Ballot are regarded as having a reasonable chance of obtaining a Second Reading, although this is by no means cut and dried since Bills lower down the order can, and sometimes do, succeed because of a combination of factors which may be particular to any Session's Private Members' schedule. Column (5) shows the number of Scots MPs gaining a place in the first eight of the Ballot. Here it can be seen that exactly 50% or 21 MPs were drawn in the first eight places. In only 2 Sessions, 1967-68 and 1976-77, did a Scots Member's name fail to appear in the top eight. In the particularly lucky year of 1972-73 Scotland's MPs managed to capture four of those eight positions. More will be said of individual years presently.

However, if one moves to column (6) it will be noted that of those 21 MPs who were in the first eight places only 6 presented a Bill which related specifically to Scotland.

Column (7) shows the total number of Bills which can be classified as involving an issue of morality. Included here are the obvious examples of abortion and divorce as well as other examples such as the control of indecent displays and the abolition of live hare coursing. The criteria for selection in this category was simply that the issue raised some question of conscience. Thus 49 or 14.6% of the 336 Bills can be so classified. Of these 49 Bills, 11 (22.4%) were sponsored by Scots MPs (as shown in column (8)), 9 relating to UK wide moral issues, e.g. abortion, and only 2 relating to Scottish moral issues.

Perhaps the most famous of the 'moral' Bills was David Steel's Medical Termination of Pregnancy Bill which was introduced in the 1966-67 Session, Steel having won 3rd place in the Ballot. Three

years later in the 1969-70 Session, Steel won another high place in the Ballot, this time 4th, but again chose to introduce a UK Bill, on this occasion an amendment to the Race Relations Act 1968.

Session 1970-71 saw the first of the Scottish moral Bills. This was the Divorce (Scotland) Bill introduced by Robert Hughes who was 3rd in the Ballot. In this same year Norman Buchan was 5th and he chose to sponsor an Employed Persons (Safety) Bill.

The following Session of 1971-72 was interesting because Willie Hamilton won 7th place. He had always been a committed supporter of divorce reform but for some reason chose to sponsor an anti-sex discrimination Bill. He persisted with this theme the following Session (1972-73) when, after winning 8th place, he introduced the same Bill. On 29th November 1972 he again presented the Anti-Discrimination Bill. Yet only two months later, on 23rd January 1973, he was attempting to introduce, under the Ten-Minute Rule, a Divorce Reform Bill. After having won a reasonable place in the 1972-73 Ballot it seems puzzling that Hamilton did not introduce a Divorce Reform Bill at that point, since there is little doubt that he was committed to such a reform. One must surmise that either he rated anti-sex discrimination a greater priority at the time, or he did not consider 8th place to offer a good enough chance of success for something as contentious as a Divorce Reform Bill.

It was in this Session ('72-'73) that 4 Scots appeared in the top eight. At No. 1 was Teddy Taylor. He was unsympathetic to divorce reform so it was no surprise that he should opt for a Bill which sought to clarify the penalties for murder. At No. 4 Ian MacArthur presented the Domicile and Matrimonial Proceedings Bill, but this did not seek to alter the principle of Scots divorce law. Then, at No. 6, Iain Sproat, who was sympathetic to divorce reform, chose the rather unimaginative

subject of the protection of wrecks in territorial waters. Willie Hamilton, of course, was at No. 8 with his anti-discrimination Bill.

Two Scots MPs appeared in the top eight of the 1974-75 Ballot, but James White (3rd) chose to attempt to amend the Abortion Act 1967, and Peter Doig (8th) presented a Bill on dogs.

So when Iain MacCormick came 4th in the 1975-76 Ballot it was perhaps not surprising he commented that he felt there was not much in the way of alternatives as regards the subject matter of his Bill. Accordingly, he introduced the Divorce (Scotland) Bill. Thus, both the moral Bills which pertained only to Scotland were divorce reform attempts.

Session 1977-78 saw Norman Buchan at No. 5 introduce a Post Office Workers (Industrial Action) Bill. Then, James White, placed at No. 8 in the 1978-79 Ballot, presented the Children Bill which concerned legitimacy. In 1979-80 two Scots Members were at Nos. 1 and 2, John Corrie and Neil Carmichael. John Corrie made another attempt to amend the Abortion Act 1967, while Neil Carmichael opted to attempt to legislate on seat belts. Finally, in the last Session with which we are concerned, 1980-81, Donald Stewart found himself in the No. 2 spot and chose to sponsor a Gaelic (Miscellaneous Provisions) Bill.

Certainly then, in recent Sessions, Scots Members have found themselves well-placed in the Private Members' Ballot. So the opportunity for homosexual law reform did exist. Presumably though these particular Members could not be persuaded as to the merits of such a reform, or if they were, did not consider it to have priority over their other commitments.

TABLE I.1

Private Members' Ballot 1966-80.

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	
Session	Total No. of Bills presented	No. of Soots MPs in Ballot	Type of Bill	Soots MP in first eight	In first 8 and presenting Soots Bill	Total No of 'moral' Bills	'Moral' Bill sponsored by Soots MP	
1966-67	25	5	1	4	1	0	2	1 (UK)
1967-68	26	1	1	0	0	0	3	0
1968-69	26	4	1	3	2	1	4	1 (UK)
1969-70	27	2	1	1	1	0	4	0
1970-71	20	3	2	1	2	1	3	1 (S)
1971-72	20	1	0	1	1	0	3	1 (UK)
1972-73	20	5	1	4	4	0	4	2 (UK)
1973-74	20	3	2	1	1	1	2	0
1974	10	1	1	0	1	1	0	0
1974-75	19	2	0	2	2	0	1	1 (UK)
1975-76	20	1	1	0	1	1	5	1 (S)
1976-77	20	2	2	0	0	0	2	0
1977-78	20	2	0	2	1	0	2	0
1978-79	20	2	0	2	1	0	5	1 (UK)
1979-80	24	5	3	2	2	0	6	2 (UK)
1980-81	19	3	3	0	1	1	3	0
TOTAL	336	42	19	23	21	6	49	11

TABLE I.2

Progress and Success Rate of Ballot Bills 1968-80*

*see over.

Session	Total	1R only	2R Debate adjourned	Failed on 2R	Committed	Failed after Rep.	Passed one House	Enacted	%
1968-69	27	8	6	6	2	0	0	5	18.5
1969-70	27	12	7	1	0	0	0	6	22
1970-71	20	5	3	1	4	0	0	7	35
1971-72	20	5	3	1	2	1	0	8	40
1972-73	20	5	3	3	1	1	0	7	35
1973-74	20	16	1	0	3	0	0	0	0
1974	10	1	2	0	2	0	1	4	40
1974-75	19	0	7	2	1	0	0	9	47
1975-76	20	5	-	(4)	-	-	-	11	55
1976-77	20	6	-	(7)	-	-	-	7	35
1977-78	20	7	-	(7)	-	-	-	6	30
1978-79	20	10	-	(10)	-	-	-	0	0
1979-80	24	6	-	(12)	-	-	-	6	25

* This composite table has been compiled from information published by Ivor Burton and Gavin Drewry in the series 'Public Legislation: A Survey of the Sessions' which appears annually in Parliamentary Affairs. The format of their information has varied over the years so that after Session 1974-75 they no longer differentiate as to how far a Bill progressed, simply classifying those Bills that pass First Reading as having been debated and progressing. The figures in brackets then, represent this category of 'Debate or progress'. They have been entered under 'Failed on 2R' for convenience only. It should be borne in mind that some Bills may have progressed further.

With the exception of two very successful Sessions in 1974-75 and 1975-76 when 9 Bills (47%) and 11 Bills (55%) were enacted, the table shows that around 6 to 7 Bills (30-35% in a Ballot of 20) have a realistic chance of success. While proportions can vary each year because of the size of the Ballot, a rough rule of thumb would seem to indicate that approximately one-third of Ballot Bills reach the Statute Book. That no Ballot Bills were enacted in 1973-74 or 1978-79 was due to the parliamentary Sessions being interrupted by General Elections. The table further shows that a great many Bills flounder very early on, failing to surmount the 'hurdle' of Second Reading, either because of pressure of time or of concerted opposition.

APPENDIX II

Voting Patterns

Table II.1 illustrates that the general tendency within the Labour Party was to vote in favour of reform. The most convincing Labour vote in favour was on the issue of homosexuality where 70% of Scottish Labour Members recorded 'Aye'. However, it should be borne in mind that although the vote was a free one, the clause was in the middle of the Criminal Justice (Scotland) Bill to which the Labour Party was hostile. Therefore, any chance that the Opposition had of embarrassing the Government would have been gratefully welcomed. On the other hand the Labour vote on the licensing issue was much more equivocal and this has already been explained as being due to the dual thinking which existed within the party about liberalisation.

The tendency within the Conservative Party though was to vote against reform with the exception of the licensing issue where they favoured relaxation. It should be remembered, however, that in this Parliament the Conservatives held only 16 Scottish seats. With more representation it is conceivable that their vote might have been more evenly split.

The Scottish Liberal vote tended to fluctuate. All 3 Scots Liberals voted against the liberalisation of the drink laws in 1976, but voted for homosexual law reform in 1980. In direct contrast the SNP voted convincingly in favour of relaxation of licensing hours, but against relaxation of the criminal law pertaining to homosexual conduct.

The broad trend within the voting by Age Groups (Table II.2) was that younger MPs tended to vote for the reforms whereas older MPs were more inclined to vote against. Both the under 35 category and the 35-44 category voted in favour on all four divisions. The 45-54

age group voted for three out of the four. MPs aged 55 and over were generally disposed to vote against reform, the total number of votes against in these last two categories outnumbering votes for by 34 to 24.

The difficulty of constructing Table II.3, which shows the breakdown of voting by Religion, is the lack of reliable information on MPs' religious convictions. Although the standard sources of Parliamentary information (e.g. 'Dod's', 'Who's Who', and 'The Times Guide') contain useful biographies of MPs, they make no reference to the nature of their religious beliefs. The only publication which appears to acknowledge MPs' religious persuasions is the 'Catholic Directory' which publishes yearly a list of Catholic Members and Peers. Table II.3, therefore, is not particularly informative. Its most striking feature is the limited impact of the Catholic vote in any of the issues. This is due simply to the small number of Scottish Catholic Members in Parliament. As the figures for each Division show, the Catholic vote is swamped by the residual group of 'Others'. It is interesting to note, however, that on each occasion the Catholic vote went against reform.

Voting by Schooling (Table II.4) shows that the old style Labour MPs who had received only Elementary schooling were rather unfavourably disposed to such reforms. It is noticeable that their numbers dwindled as the decade progressed being replaced by the next generation of 'new style' Labour Members. Those with a Scottish Secondary schooling though, were much more favourably disposed to the reforms, voting for them in all four divisions. The voting of MPs who had been to an independent school in Scotland fluctuated. They were marginally in favour of divorce reform in the early part of the decade, but marginally against the licensing and homosexual reforms of later

years. The voting of MPs educated at English grammar or public schools showed no particular trend. It can, however, be noted that the public schoolboys voted, for whatever reason, overwhelmingly in favour of relaxing the drink laws.

Table II.5 on voting by Higher Education does not reveal any clear pattern. Scottish University graduates voted in favour in three of the divisions and voted only narrowly against in the other, but apart from that there is no apparent consistency in the way the votes were cast.

Voting by Region (Table II.6) is another table which shows the voting pattern to fluctuate. Glasgow, perhaps not surprisingly because of its large Catholic population, opposed divorce law reform, but supported both the licensing and homosexual conduct relaxations. Edinburgh opposed the first divorce reform, but swung dramatically in favour on the second, due to a change of heart by some Tory MPs and to other MPs being replaced after the 1970 Election. Edinburgh too favoured licensing reform, but was equivocal over decriminalising homosexual relations between consenting adults in private. The Highland vote against the relaxation of drinking hours is another noticeable feature.

Table II.7, voting by Occupation, shows that the largest group, the Miscellaneous White Collar group, generally voted in favour with the exception of the licensing issue where it opposed liberalisation. In contrast, MPs from the world of business voted against the reforms except on licensing where they voted for relaxation. After opposing the initial divorce reform, MPs from the professions swung round to support in 1971. They also supported licensing reform, but remained equivocal on the issue of homosexuality.

The Voting Analysed.

The Divisions

Subject	Date	Parliament	Sponsor	Reading	Vote		Scottish Vote	
					Ayes	Noes	Ayes	Noes
Divorce	27.1.70	(1966-70)	Dewar	First	115	84	19	25
Divorce	22.1.71	(1970-74)	Hughes	Second	73	17	23	13
Licensing*	27.7.76	(Oct 1974 - 79)	Govt.	Report	36	57	30	36
Homo- Sexuality	22.7.80	(1979-)	Cook	Report	205	82	34	16

*This Division refers to the Sunday opening of public houses. It was selected as being indicative of feeling on Clayson's liberal philosophy. The vote is on Government New Clause 1 which requires public houses to remain closed on Sundays. Therefore an "Aye" vote in favour of the new clause is a vote *against* Sunday opening. A "No" vote represents a vote in *favour* of Sunday opening.

Party composition in Scotland for the four Parliaments**

Parliament	Total MPs	Lab.	Cons.	Lib.	SNP
1966-70	71	45	21	4	1
1970-74	71	44	23	3	1
1974-79	71	41	16	3	11
1979-	71	44	22	3	2

**at the time of each division.

TABLE II.1

Scottish Voting by Party

	Total vote	Scottish vote	Lab.	Cons.	Lib.	SNP
voting in "favour of reform" ¹						
Divorce 1970	115	19 (26.7%)	14 (31.1%)	3 (14.2%)	2 (50%)	0 (-)
Divorce 1971	73	23 (32.4%)	17 (38.6%)	5 (21.7%)	1 (33%)	0 (-)
Licensing	57	36 (50.7%)	19 (46.3%)	10 (62.5%)	0 (-)	7 (63.6%)
Homosexuality	205	34 (47.9%)	31 (70.4%)	0 (-)	3 (100%)	0 (-)
voting "against reform" ²						
Divorce 1970	84	25 (35.2%)	10 (22.2%)	13 (61.9%)	2 (50%)	1 (100%)
Divorce 1971	17	13 (18.3%)	7 (15.9%)	6 (26.1%)	0 (-)	0 (-)
Licensing	36	30 (42.2%)	18 (43.9%)	6 (37.5%)	3 (100%)	3 (27.2%)
Homosexuality	82	16 (22.5%)	2 (4.5%)	12 (54.5%)	0 (-)	2 (100%)

¹includes Licensing "No" votes.²includes Licensing "Aye" votes.

TABLE II.2

Scottish voting by Age Groups*

	Total vote	Scot. vote	Under 35	35-44	45-54	55-64	65+	Age Unknown
voting in "favour of reform"								
Div. 1970	115	19	3	4	5	4	1	2
Div. 1971	73	23	3	7	11	1	0	1
Licensing	57	36	5	10	12	9	0	0
Homosex.	205	34	4	12	9	8	1	0
voting "against reform"								
Div. 1970	84	25	1	2	9	10	3	0
Div. 1971	17	13	1	3	6	2	1	0
Licensing	36	30	2	8	7	8	5	0
Homosex.	82	16	1	5	5	5	0	0

*Age of MP at time of vote.

TABLE II.3

Scottish voting by Religion

	Total vote	Scottish vote	Catholic	Others
voting in "favour of reform"				
Divorce 1970	115	19	1	18
Divorce 1971	73	23	0	23
Licensing	57	36	2	34
Homosexuality	205	34	1	33
voting "against reform"				
Divorce 1970	84	25	3	22
Divorce 1971	17	13	2	11
Licensing	36	30	3	27
Homosexuality	82	16	2	14

TABLE II.4 Scottish voting by Schooling

	Total vote	Scot. vote	Unknown	Scot. Elem.	Scot. Secon.	Scot. Indep.	English Grammar	English Public
voting in "favour of reform"								
Div. 1970	115	19	1	1	9	4	1	3
Div. 1971	73	23	3	1	11	4	1	3
Licensing	57	36	2	0	23	4	1	6
Homosex.	205	34	2	0	26	2	3	1
voting "against reform"								
Div. 1970	84	25	4	3	7	2	2	7
Div. 1971	17	13	3	1	6	1	0	2
Licensing	36	30	3	2	16	6	2	1
Homosex.	82	16	0	0	10	3	0	3

TABLE II.5 Scottish voting by Higher Education

	Total vote	Scot. vote	Oxbridge	Other English	Scot. Univ.	Other H.E.	None	Unknown
voting in "favour of reform"								
Div. 1970	115	19	5	1	5	2	4	2
Div. 1971	73	23	4	1	10	1	5	2
Licensing	57	36	8	1	15	3	7	2
Homosex.	205	34	5	1	14	5	8	1
voting "against reform"								
Div. 1970	84	25	7	1	6	3	5	3
Div. 1971	17	13	3	0	3	1	5	1
Licensing	36	30	5	1	10	4	8	2
Homosex.	82	16	5	0	3	3	5	0

TABLE II.6 Scottish voting by Region

	Total vote	Scot. vote	Borders	S.W.	Glasgow + 'west'	Edinburgh + 'east'	Central	N.E.	High- lands
voting in "favour of reform"									
Div. 1970	115	19	2	2	7	2	2	3	1
Div. 1971	73	23	1	3	7	6	2	3	1
Licensing	57	36	1	5	13	6	5	6	0
Homosex.	205	34	2	3	16	4	5	1	3
voting "against reform"									
Div. 1970	84	25	0	4	9	5	4	1	2
Div. 1971	17	13	0	1	9	0	1	1	2
Licensing	36	30	1	3	11	3	5	1	6
Homosex.	32	16	0	3	3	4	1	2	3

TABLE II.7 Scotting voting by Occupation

	Total vote	Scot. vote	Professions	Misc. White Collar	Business	Forces	Workers	Un- Known
voting in "favour of reform"								
Div. 1970	115	19	3	11	2	1	1	1
Div. 1971	73	23	4	13	2	0	1	3
Licensing	57	36	9	12	5	2	4	4
Homosex.	205	34	5	22	3	0	3	1
voting "against reform"								
Div. 1970	84	25	5	8	4	2	2	4
Div. 1971	17	13	0	6	3	2	1	1
Licensing	36	30	5	18	3	1	1	2
Homosex.	32	16	5	2	7	0	1	1